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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 82

FRANK COOK, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MAY 16, 1932

CERTIORARI GRANTED OCTOBER 10, 1932

(36,771)

(36,771)

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in United States circuit court of appeals, first circuit	1	1
Caption.....(omitted in printing)..	1	
Record from district court of the United States, District of Rhode Island	1	1
Caption.....(omitted in printing)..	1	
Libel of information in admiralty No. 1646	2	1
Same, No. 1647	7	6
Warrant and monition, No. 1646	10	8
Same, No. 1647	12	10
Claim of owner, No. 1646	14	11
Claimant's answer, etc., No. 1646	14	12
Claim, answer, and exceptions, No. 1647	17	14
Minute entry of hearing	19	16
Statement of evidence	19	16
Stipulation	19	16
Testimony of Charles W. Lawson	19	17
Floyd Sexton	40	37
Richard Ross	41	39
Thomas F. Hull	45	43
Harold E. McClure	50	48
Frank D. Cook	51	49

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 22, 1932

	Original	Print
Stipulation as to exhibits	62	61
Motion to release on bond	63	61
Affidavit of Frank Cook in support of motion to release on bond	63	62
Appraisal	63	62
Opinion of court, Letts, J	64	62
Final decree, No. 1646	83	79
Petition for appeal, No. 1646, and order allowing same	84	80
Assignment of errors, No. 1646	85	81
Final decree, No. 1647	85	81
Petition for appeal, No. 1647, and order allowing same	86	82
Assignment of errors, No. 1647	87	83
Extensions of time, etc	88	84
Stipulations for consolidation (allowed)	88	84
Findings of fact, No. 1646	89	85
Conclusions of law, No. 1646	90	86
Libellant's exceptions, No. 1646	91	87
Libellant's bill of exceptions, No. 1646	93	88
Findings of fact, No. 1647	94	90
Conclusions of law, No. 1647	95	91
Libellant's exceptions, No. 1647	95	91
Libellant's bill of exceptions, No. 1647	96	92
Extensions of time, etc	97	93
Citations and returns of service thereof (omitted in printing)	98	
Præcipe, No. 1646	100	93
Præcipe, No. 1647	101	94
Certificate of clerk (omitted in printing)	102	
Argument and submission (omitted in printing)	103	
Opinion, Bingham, J	105	95
Final decree	117	106
Clerk's certificate (omitted in printing)	117	
Order allowing certiorari	118	107

[fols. a-1] [Captions omitted]

[fol. 2]

IN UNITED STATES DISTRICT COURT, DISTRICT OF RHODE ISLAND

Admiralty. No. 1646

UNITED STATES OF AMERICA

v.

BRITISH MOTOR SCREW "MAZEL TOV"

Admiralty. No. 1647

UNITED STATES OF AMERICA

v.

400 SACKS AND 6 BOTTLES MORE OR LESS OF DISTILLED SPIRITS EX BRITISH MOTOR SCREW "MAZEL TOV"

The above-entitled actions, as hereinafter appears, by stipulation of counsel and order of court, were consolidated for purposes of appeal, and the joint record is as follows:

LIBEL OF INFORMATION IN ADMIRALTY 1646—Filed November 25, 1930

To the Honorable Ira Lloyd Letts, United States District Judge for the District of Rhode Island, sitting in admiralty:

The libel of the United States of America, by its proctor, Henry M. Boss, Jr., United States Attorney for the District of Rhode Island, against the British Motor Screw "Mazel Tov," her engines, tackle, apparel and furniture and against all persons lawfully intervening for their interests therein, in a cause of condemnation, forfeiture and penalty, civil and maritime, under the Customs and Revenue laws of the United States, on information and belief alleges as follows:

First. That at all times hereinafter mentioned, the libellant was and still is a corporation sovereign.

Second. That at all times hereinafter mentioned the said British Motor Screw "Mazel Tov" was operating under a certificate of British registry issued at Halifax, Nova Scotia October 1, 1929 to Fortune Bay Shipping Company, [fol. 3] Ltd. of Halifax, Nova Scotia, registry changed on May 21, 1930 to the Mazel Tov Shipping Co., Ltd., of Halifax, Nova Scotia.

Third. That at all times hereinafter mentioned Frank Cook of Lunenburg, Nova Scotia, was master of the said British Motor Screw "Mazel Tov."

Fourth. That at all times hereinafter mentioned said British Motor Screw "Mazel Tov" was bound to the United States.

Fifth. That prior to and, to wit, on the first day of November, A. D. 1930, said British — Screw "Mazel Tov" had committed, was committing and was attempting to commit an offense against the laws of the United States prohibiting the importation of alcoholic beverages by conveying said alcoholic liquors to the United States by itself and by a vessel or vessels other than the "Mazel Tov," its speed and the speed of such other vessel or vessels being such that it and they could and did reach the coast of the United States by traversing the distance from the "Mazel Tov" to the coast within one hour.

Sixth. That heretofere, to wit, on the 1st day of November, A. D. 1930 on the navigable waters of the United States, to wit, about 9⅞ miles from No Man's Land in the State of Massachusetts and within a Collection District of the United States Customs Service, T. J. Sexton, Lt. Commander in command of the United States Coast Guard Destroyer Tucker, duly authorized in the premises, seized said British Motor Screw "Mazel Tov" and thereafter turned over said vessel to the Collector of Customs at the Port of Providence in said District and within the Admiralty and maritime jurisdiction of this Honorable Court.

Seventh. That before the filing of this libel, said Collector of Customs of the Port of Providence adopted said seizure made as aforesaid and now holds said British Motor Screw "Mazel Tov" at said Providence in said District and within the admiralty and maritime jurisdiction of this Hon-[fol. 4] orable Court as forfeited to the United States for

the penalties imposed by Sections 584 and 585 of the Tariff Act of 1930.

Causes for Penalty

First Cause for Penalty

(Sec. 584 of the Tariff Act of 1930)

Eighth. Your libellant repeats and realleges as part of this cause for penalty, civil and maritime, each and every allegation contained in the articles heretofore numbered, "First," "Second," "Third," "Fourth," "Fifth," "Sixth" and "Seventh," hereinbefore set forth.

Ninth. That heretefore, to wit, on the 1st day of November A. D. 1930, on the navigable waters of the United States, to wit, about 9⅞ miles from No Man's Land in the State of Massachusetts and within a Collection District of the United States Customs Service, said Frank Cook, who was then and there master of said British Motor Screw "Mazel Tov," which was then and there bound to the United States, failed to produce the manifest of the cargo of said vessel upon the demand of an officer of the law, to wit, T. J. Sexton, Lt. Commander in command of the United States Coast Guard Destroyer Tucker, duly authorized to make such demand, contrary to the form of the statute and of the treaty between the United States and Great Britain, in such case made and provided.

Tenth. That by reason of the foregoing and by virtue of the provisions of Section 584, Title IV of the Tariff Act of 1930, the said Frank Cook became liable to a penalty of $500, which penalty was assessed against said master by said Collector of Customs for the payment of which said penalty said British Motor Screw "Mazel Tov" then and there became subject to seizure and summary proceedings by libel to recover the same.

Eleventh. That all and singular the premises are true and [fol. 5] within the civil and maritime jurisdiction of the United States of America and of this Honorable Court.

Second Cause for Penalty

(Sec. 584 of the Tariff Act of 1930)

Twelfth. Your libellant repeats and realleges as part of this cause for penalty, civil and maritime, each and every

allegation contained in the articles heretofore numbered, "First", "Second", "Third", "Fourth", "Fifth", "Sixth" and "Seventh", hereinbefore set forth.

Thirteenth. That heretofore, to wit, on or about the 1st day of November, A. D. 1930, about 9-7/8 miles from No Man's Land, Massachusetts, in Collection District No. 4 of the United States Customs Service, there was found on board said British Motor Screw "Mazel Tov", merchandise, to wit, 403 sacks and 6 loose bottles of distilled spirits of great value, to wit, of the value of $14,286.18, not included or described in any manifest of the cargo of said British Motor Screw "Mazel Tov", contrary to the form of the statute in such case made and provided, which said merchandise was delivered to the Collector of the Fifth Collection District in the Port of Providence, within the jurisdiction of this Honorable Court.

Fourteenth. That by reason of the foregoing and by virtue of the provisions of Section 584 of Title IV of the Tariff Act of 1930, the said Frank Cook became liable to a penalty equal to the value of said merchandise, found as aforesaid, to wit, a penalty of $14,286.18, which penalty was assessed against said master by said Collector of Customs, for the payment of which said penalty said British Motor Screw "Mazel Tov" then and there became subject to seizure and summary proceedings by libel to recover the same.

Fifteenth. That all and singular the premises are true and within the civil and maritime jurisdiction of the United States of America and of the Honorable Court.

[fol. 6] Third Cause for Penalty

(Sec. 585 of the Tariff Act of 1930)

Sixteenth. Your libellant repeats and realleges as part of this cause for penalty, civil and maritime, each and every allegation contained in the articles heretofore numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth" and "Seventh", hereinbefore set forth.

Seventeenth. That heretofore, to wit, on or about the 1st day of November A. D. 1930, the said British Motor Screw

"Mazel Tov" arrived from a foreign port or place, to your libellant unknown, within the limits of Collection District No. 4, to wit, at a place about 9-7/8 miles from No Man's Land, Massachusetts, and thereafter, to wit, on or about the 1st day of November, A. D. 1930, attempted to depart from said Collection District, having then and there unladen merchandise from said vessel without making a report or entry under the provisions of the Tariff Act of 1930, not by reason of stress of weather or other necessity contrary to the form of the statute in such case made and provided.

Eighteenth. That by reason of the foregoing and by virtue of the provisions of Section 585 of Title IV of the Tariff Act of 1930, said Frank Cook became liable to a penalty of $5,000, which penalty was assessed against said master by said Collector of Customs, for the payment of said penalty said British Motor Screw "Mazel Tov" then and there became subject to seizure and summary proceedings by libel to recover the same.

Nineteenth. That all and singular the premises are true and within the civil and maritime jurisdiction of the United States of America and of this Honorable Court.

Wherefore your libellant prays that due process of law may be awarded against the British Motor Screw "Mazel Tov", her engines, tackle, apparel and furniture and that [fol. 7] due notice be given all persons concerned to appear on the return day of said process, to show cause, if any they have, why said vessel should not be condemned, forfeited and sold for the causes aforesaid and the proceeds of said sale be distributed according to law and such other distribution be had thereof as well for the penalties aforesaid as for the causes of forfeiture and such other disposition thereof be made as the Court shall direct.

Henry M. Boss, Jr., United States Attorney.

Duly sworn to by Henry M. Boss, Jr. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

LIBEL OF INFORMATION IN ADMIRALTY 1647—Filed November 25, 1930

To the Honorable Ira Lloyd Letts, United States District Judge for the District of Rhode Island:

The libel of information of the United States of America, by its proctor, Henry M. Boss, Jr., United States Attorney for the District of Rhode Island, in a cause of forfeiture, civil and maritime, for breach of the provisions of the Tariff Act of 1930, upon information and belief alleges:

First. That at all times hereinafter mentioned, libellant was and still is a sovereign power.

Second. That at all times hereinafter mentioned the said British Motor Screw "Mazel Tov" was operating under a [fol. 8] certificate of British registry issued at Halifax, Nova Scotia, October 1, 1929 to Fortune Bay Shipping Company, Ltd., of Halifax, Nova Scotia, registry changed on May 21, 1930 to the Mazel Tov Shipping Co., Ltd., of Halifax, Nova Scotia.

Third. That prior to, and to wit, on the 1st day of November, 1930, said British Motor Screw "Mazel Tov" was bound to the United States with a cargo of distilled spirits which was consigned to the master of the vessel, with the seals broken, and had committed, was committing and was attempting to commit an offense against the laws of the United States prohibiting the importation of alcoholic beverages by conveying said alcoholic beverages to the United States, said vessel by itself and by a vessel or vessels other than the "Mazel Tov", its speed and the speed of such other vessel or vessels being such that it and they could and did reach the coast of the United States by traversing the distance from the "'Mazel Tov" to the coast within one hour.

Fourth. That heretofore, to wit, on the 1st day of November, 1930, on the navigable waters of the United States, to wit, about 9⅞ miles from No Man's Land, Massachusetts, and within Collection District No. 4 of the United States Customs Service, Lt. Commander T. J. Sexton, in

command of the United States Coast Guard Destroyer Tucker, duly authorized in the premises, went on board the said British Motor Screw "Mazel Tov", seized said 403 sacks and 6 bottles more or less of distilled spirits and thereafterwards turned over the said 403 sacks and 6 bottles more or less of distilled spirits to the Collector of Customs of the Fifth Collection District at the Port of Providence, in said District and within the admiralty and maritime jurisdiction of this Honorable Court.

Fifth. That before the filing of this libel, the Collector of Customs of the Fifth Collection District at the Port of Providence adopted said seizure made as aforesaid and now holds said 403 sacks and 6 bottles more or less of distilled spirits at said Providence in said District and within [fol. 9] the admiralty and maritime jurisdiction of this Honorable Court as forfeited to the United States for violation of the provisions of Section 584 of the Tariff Act of 1930.

[fol. 9] Cause for Penalty and Forfeiture

(Sec. 584 of the Tariff Act of 1930)

Sixth. Your libellant repeats and realleges as part of this cause for penalty and forfeiture, civil and maritime, each and every allegation contained in the articles hereof numbered "First", "Second", "Third", "Fourth" and "Fifth".

Seventh. That heretofore, to wit, on or about the 1st day of November, 1930, about 9⅞ miles from No Man's Land, Massachusetts, in Collection District No. 4 of the United States Customs Service there was found on board said British Motor Screw "Mazel Tov" merchandise, to wit, 403 sacks and 6 bottles more or less of distilled spirits of great value, to wit, of the value of $14,286.18, not included or described in the manifest of the cargo of said British Motor Screw "Mazel Tov", contrary to the form of the statute in such case made and provided, which said merchandise was delivered to and is now held by the Collector of the 5th Collection District at the Port of Providence, within the admiralty and maritime jurisdiction of this Honorable Court.

Eighth. That Frank Cook of Lunenburg, Nova Scotia was at the time of said seizure and now is master of the said British Motor Screw "Mazel Tov".

Ninth. That by reason of the foregoing and by virtue of the provisions of Section 584, Title IV of the Tariff Act of 1930, the said Frank Cook became liable to a penalty equal to the value of said merchandise found as aforesaid, constituting a penalty of $14,286.18, which penalty was assessed against said master by said Collector of Customs for the payment of which said penalty the said merchandise then and there became subject to seizure and forfeiture and summary proceedings by libel to recover the said penalty.

[fol. 10] Tenth. That all and singular the premises are true and within the civil and maritime jurisdiction of the United States of America and of this Honorable Court.

Wherefore your libellant prays that due process of law may be awarded against said 403 sacks and 6 bottles more or less of distilled spirits and that due notice be given all persons concerned why said condemnation and forfeiture should not be decreed or such other disposition be made as this Honorable Court shall direct.

Henry M. Boss, Jr., United States Attorney.

Duly sworn to by Henry M. Boss, Jr. Jurat omitted in printing.

IN UNITED STATES DISTRICT COURT

WARRANT AND MONITION ON LIBEL IN ADMIRALTY 1646—Issued November 25, 1930, with Marshal's Return Thereon

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF RHODE ISLAND

The President of the United States of America to the Marshal for the District of Rhode Island or to his Deputy, Greeting:

Whereas, a libel hath been filed in the District Court of the United States for the District of Rhode Island, on the

twenty-fifth day of November, A. D. 1930, by the United States of America, by its proctor, Henry M. Boss, Jr., [fol. 11] United States Attorney for the District of Rhode Island against the British Motor Screw Mazel Tov, etc. in a cause of condemnation, forfeiture and penalty, civil and maritime, under the customs and revenue laws of the United States for the reasons and causes in said libel mentioned, and praying the usual process and monition of the said court, in that behalf to be made, and that all persons interested in the said British Motor Screw Mazel Tov, etc., may be cited in general and special to answer the premises, and all proceedings being had, that the said British Motor Screw Tov, etc. may, for the causes in said libel mentioned, be condemned and forfeited as prayed in said libel.

You are therefore commanded to attach said British Motor Screw Mazel Tov, etc. and to detain the same in your custody until further order of court and to give due notice to all persons claiming the same or having anything to say why the same should not be condemned and forfeited pursuant to the prayer of said libel, that they appear before said court to be held at Providence, in and for said district, on the second day of December, A. D. 1930, at 10 o'clock a. m., then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return hereof, together with this writ.

Witness the Honorable Ira Lloyd Letts, Judge of said court, at Providence, this twenty-fifth day of November, A. D. 1930.

Alice Peckham, Clerk. (Seal.)

Marshal's Return

At Pawtuxet, R. I., November 25, 1930.

In obedience to the within monition, I seized the within-named British Motor Screw Mazel Tov and have given due notice to all persons claiming the same, by advertising the substance of this monition in the Providence Journal, No- [fol. 12] vember 26, 1930 and the Evening Bulletin, November 28, 1930, and by posting a notice of seizure on the said

boat and on the bulletin board of the United States District Court.

Howard C. Arnold, United States Marshal, by Waldo D. Rouviere, Deputy.

Service, $2; travel, .30; copy and posting, $1.30; advertising, $1.

IN UNITED STATES DISTRICT COURT

WARRANT AND MONITION ON LIBEL IN ADMIRALTY 1647—ISSUED NOVEMBER 25, 1930, WITH MARSHAL'S RETURN THEREON

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF RHODE ISLAND

The President of the United States of America to the Marshal for the District of Rhode Island or to his Deputy, Greeting:

Whereas, a libel hath been filed in the District Court of the United States for the District of Rhode Island, on the twenty-fifth day of November, A. D. 1930, by the United States of America, by its proctor, Henry M. Boss, Jr., United States Attorney for the District of Rhode Island, against 403 sacks and 6 bottles, more or less, of distilled spirits ex British Motor Screw Mazel Tov in a cause of forfeiture, civil and maritime, for breach of the provisions of the Tariff Act of 1930 for the reasons and causes in said libel mentioned, and praying the usual process and monition of the said court, in that behalf to be made, and that all persons interested in the said 403 sacks and 6 bottles, more or less, of distilled spirits ex British Motor Screw Mazel Tov may be cited in general and special to answer the premises, and all proceedings being had, that the said 403 sacks and 6 bottles, more or less, of distilled spirits ex British Motor Screw Mazel Tov may, for the causes in said libel mentioned, be condemned and forfeited as prayed in said libel.

You are therefore commanded to attach said 403 sacks [fol. 13] and 6 bottles, more or less, of distilled spirits ex British Motor Screw Mazel Tov and to detain the same

in your custody until further order of court and to give due notice to all persons claiming the same or having anything to say why the same should not be condemned and forfeited pursuant to the prayer of said libel, that they appear before said court to be held at Providence, in and for said District, on the second day of December, A. D. 1930, at 10 o'clock a. m., then and there to interpose a claim for the same and to make their allegations in that behalf. And what you shall have done in the premises, do you then and there make return thereof, together with this writ.

Witness, the Honorable Ira Lloyd Letts, Judge of said court, at Providence, this twenty-fifth day of November, A. D. 1930.

Alice Peckham, Clerk. (Seal.)

Marshal's Return

At Providence, R. I., November 25, 1930.

In obedience to the within monition, I seized the within named 403 sacks and 6 bottles of distilled spirits, more or less, ex British Motor Screw Mazel Tov and have given due notice to all persons claiming the same, by advertising the substance of this monition in the Providence Journal, November 26, 1930, and Evening Bulletin, November 28, 1930, and by posting a notice of seizure on the bulletin board of the United States District Court.

Howard C. Arnold, United States Marshal, by Waldo D. Rouviere, Deputy.

Service, $2; travel, 06; copy and posting, $1.30; advertising, $1.

[fol. 14] In United States District Court

Claim of Owner, Admiralty No. 1646—Filed January 7, 1930

Now comes Frank Cook of Lunenburg, Nova Scotia, master and bailee of the British Motor Screw Mazel Tov, registered to the Mazel Tov Shipping Co., Ltd., of Halifax, Nova Scotia, and protesting that the seizure of the above-named vessel by the United States of America was in violation of

the laws and statutes of the United States of America, and without waiving any of his rights which he may have under the laws of the United States of America, being compelled to make the admission herein for the purpose of recovering his property so seized as aforesaid, claims that the Mazel Tov Shipping Co., Ltd., of Halifax, Nova Scotia, is the true and lawful owner of the said vessel, her engines, tackle, apparel, and furniture, as the same seized at the instance of the United States of America, and prays that it may be permitted to appear in that certain libel filed against said vessel and to defend the same, and further representing that it is desirous of having said vessel released on bond, prays that this court grant it an order to release said vessel, her engines, tackle, apparel and furniture, upon giving proper bond in accordance with Revised Statutes, Section 938 (Title 28, Section 751, U. S. C. A.).

Frank Cook.

IN UNITED STATES DISTRICT COURT

CLAIMANT'S ANSWER AND AMENDMENT THERETO AND EXCEPTIONS IN ADMIRALTY 1646—Filed December 2, 1930

To the Honorable the District Judge of and for the District Court of the United States in and for the District of Rhode Island:

Frank Cook of Lunenburg, Nova Scotia, master and claimant of the British Motorship Mazel Tov, her engines, tackle, apparel, and furniture, as the same are proceeded against by the libel of the United States of America in a [fol. 15] cause of forfeiture, admiralty and maritime, answers and excepts to said libel:

First. The claimant admits the allegations in the first article of said libel.

Second. The claimant admits the allegations in the second article of said libel.

Third. The claimant admits the allegations in the third article of said libel.

Fourth. The claimant denies the allegations in the fourth article of said libel.

Fifth. The claimant denies the allegations in the fifth article of said libel.

Sixth. The claimant denies the allegations in the sixth article of said libel.

Seventh. The claimant denies the allegations in the seventh article of said libel.

Eighth. As to the eighth article of the libel the claimant answers each and every allegations as answered in articles First, Second, Third, Fourth, Fifth, Sixth and Seventh, as hereinbefore set forth.

Ninth. The claimant denies the allegations in the ninth article of said libel.

Tenth. The claimant denies the allegations in the tenth article of said libel.

Eleventh. The claimant denies the allegations in the eleventh article of said libel.

Twelfth. As to the twelfth article of the libel the claimant answers each and every allegation as answered in articles First, Second, Third, Fourth, Fifth, Sixth and Seventh, as hereinbefore set forth.

Thirteenth. The claimant denies the allegations in the thirteenth article of said libel.

Fourteenth. The claimant denies the allegations in the fourteenth article of said libel.

[fol. 16] Fifteenth. The claimant denies the allegations in the fifteenth article of said libel.

Sixteenth. As to the sixteenth article of the libel the claimant answers each and every allegation as answered in articles First, Second, Third, Fourth, Fifth, Sixth and Seventh, as hereinbefore set forth.

Seventeenth. The claimant denies the allegations in the seventeenth article of said libel.

Eighteenth. The claimant denies the allegations in the eighteenth article of said libel.

Nineteenth. The claimant denies the allegations in the nineteenth article of said libel.

Twentieth. The exception of Frank Cook, claimant of the British Motorship Mazel Tov in the above-entitled cause respectfully shows that said vessel was not seized within the territorial limits of any jurisdiction of the United States, but, on the contrary, was captured and boarded at a point more than four (4) leagues from the coast of the United States, and was not seized on any of the waters of the United States or within any collection district of the United States as alleged in said libel, and it was not the intention at any time to enter any of the territorial limits of the United States and that therefore this court has no juristion sitting in admiralty in this matter.

Wherefore the claimant prays that said libel may be dismissed and that said claimant may recover his costs.

Frank Cook.

Duly sworn to by Frank Cook. Jurat omitted in printing.

[fol. 17] Amended

Frank Cook, master and claimant of the British Motorship Mazel Tov, on oath deposes and says that he is the lawful bailee of the aforesaid vessel for its owner, the Mazel Tov Shipping Co., Ltd., of Halifax, Nova Scotia, that he has read the foregoing answer and exceptions and that the same are true to the best of his knowledge and belief.

Frank Cook.

Sworn to this fourth day of December, A. D. 1930.
Joseph E. Fitzpatrick, Notary Public.

In United States District Court

Claim, Answer, and Exceptions in Admiralty No. 1647—Filed December 2, 1930

To the Honorable the District Judge of and for the District Court of the United States in and for the District of Rhode Island:

Frank Cook of Lunenburg, Nova Scotia, consignee and claimant of a certain cargo of assorted intoxicating liquors on board the British Motor Screw Mazel Tov, as the same are proceeded against by the libel of the United States of America in a cause of forfeiture, admiralty and maritime, answers and excepts to said libel;

First. The claimant admits the allegations in the first article of said libel.

Second. The claimant admits the allegations in the second article of said libel.

Third. The claimant denies the allegations in the third article of said libel.

Fourth. The claimant denies the allegations in the fourth article of said libel.

Fifth. The claimant denies the allegations in the fifth article of said libel.

[fol. 18] Sixth. As to the sixth article of the libel the claimant answers each and every allegation as answered in articles First, Second, Third, Fourth and Fifth, as hereinbefore set forth.

Seventh. The claimant denies the allegations in the seventh article of said libel.

Eighth. The claimant admits the allegations in the eighth article of said libel.

Ninth. The claimant denies the allegations in the ninth article of said libel.

Tenth. The claimant denies the allegations in the tenth article of said libel.

Eleventh. The exception of Frank Cook, claimant of the aforementioned sacks of assorted intoxicating distilled spirits ex British Motor Screw Mazel Tov in the above entitled cause respectfully shows that said cargo was not seized within the territorial limits of any jurisdiction of the United States, but on the contrary was captured and boarded at a point more than four (4) leagues from the coast of the United States, and was not seized on any of the waters of the United States or within any collection district

of the United States as alleged in said libel, and that it was not the intention at any time to land or bring any of the aforesaid cargo into any of the territorial limits of the United States, and that therefore this court has no jurisdiction sitting in admiralty in this matter.

Wherefore the claimant prays that said libel may be dismissed and that said claimant may recover his costs.

Frank Cook.

Duly sworn to by Frank Cook. Jurat omitted in printing.

[fol. 19] In United States District Court

Minute Entry of Hearing

On the same date, to wit, the second day of December, 1930, the return day of the Warrant and Monition in each case, the cases were duly called in open court, and no other person responding to said call other than the claimant already of record, orders of default were entered as to all persons other than Frank Cook of Lunenburg, Nova Scotia, master and bailee of the British Motor Screw Mazel Tov.

Thereafter, to wit, on the fourth day of December, 1930, the action numbered Admiralty 1646 was consolidated for hearing within Admiralty No. 1647, fully heard upon claimant's oral motion to dismiss the libel, and decision thereupon was reserved.

In United States District Court

Statement of Evidence

Stipulation

It is hereby stipulated and agreed that the transcript of testimony in the above-entitled case shall consist of the entire record with the exception of the omissions indicated therein.

Charles H. Eden, Assistant United States Attorney.
Joseph E. Fitzpatrick, Proctor for Claimant.

CHARLES W. LAWSON (Sworn)

By Mr. Boss:

Q. 1. What is your official position?

A. Executive officer, on the Tucker.

Q. 2. Of the United States destroyer Tucker?

A. United States destroyer Tucker.

Q. 3. And you are registered as lieutenant?

A. Lieutenant.

[fol. 20] Q. 4. Yes, and were you aboard the Tucker on November 1, 1930?

A. I was.

Q. 5. At that time did you sight the British ship Mazel Tov?

A. We sighted a vessel which later proved to be the Mazel Tov; yes, sir.

Q. 6. And where were you when you sighted her?

A. You mean the position of the vessel?

Q. 7. Yes—first, in what water was the Tucker?

A. We were cruising in an area to the southeastward of No Man's Land, Massachusetts.

Q. 8. And at what hour, approximately?

A. She was first sighted about five minutes of six.

Q. 9. On November 1?

A. November 1, 1930.

Q. 10. Is that morning or afternoon?

A. At night.

Q. 11. Yes, and what was the position of the Tucker?

A. I shall have to refer to the log, to be exact.

The Court: Do you need more than an approximate position for that?

Mr. Boss: Yes; I will amend the question.

Q. 12. What was the exact position of the Tucker at the time you first sighted the Mazel Tov?

A. Forty-one degrees, 9 minutes, 35 seconds north latitude, 70 degrees, 37 minutes, 15 seconds west longitude.

Q. 13. And did you at any time take the position of the Mazel Tov?

A. She was approximately half a mile, 140 true from us —bearing.

Q. 14. Astern?

A. No, sir; on our port bow.

Q. 15. Can you state your exact position in nautical miles from land?

A. When we first sighted them?

Q. 16. Yes.

A. May I have a piece of paper? Nine and seven-eighths miles.

Q. 17. That is the Tucker was 9⅞ miles from the nearest point of the coast of the United States?

A. Yes, sir, when we first sighted her.

[fol. 21] Q. 18. And that land was what land?

A. No Man's Land, Massachusetts.

Q. 19. At that time the Mazel Tov was half a mile—approximately half a mile away?

A. Yes, sir. We were headed south 180 true and she bore 140 from us, true.

Q. 20. Now, in what direction was she headed?

A. She was headed toward us, which would bring her headed approximately northwest. We ran—she was headed approximately 320 degrees true, roughly north—northwest magnetic, which would head her for Gay Head, Massachusetts.

Q. 21. Do you know whether she was under way or not?

A. No, sir, she was in the path of the moon, headed toward us and as she turned you could see her whole outline and then diminishing as she stood to the southerly. I couldn't state whether she was under way at the time or not.

Q. 22. Did you approach her?

A. Yes, sir; she was without lights so we changed our course to investigate her. We ran for approximately three or four minutes and she began to get underway and headed to the southward, so we halted a little bit to keep her in the path of the moon as she was without lights, so we could keep her in sight.

Q. 23. Did you chase her?

A. We chased her and we were alongside of her about three minutes after six. I can refer to the log and give you the exact time. "At 6.3 along side small boat turned on and shifted right and found it to be the British Motor vessel 'Mazel Tov' of Halifax, Nova Scotia. Signaled small boat to stop by use of whistle. 6.5 drifting along side 'Mazel Tov.'"

Q. 24. Did you or anyone to your knowledge take the position of the Mazel Tov when she was first sighted—the exact position?

A. We couldn't determine the exact position, we weren't there to determine its exact position, but it was approximately half a mile. Visibility was fair, but at night you can't see a great distance and she was just on the edge of the path of the moon and it is only—well it couldn't have [fol. 22] been over half a mile on account of visibility at the time, maybe a half to three-quarters; it couldn't be over three-quarters at the time. Slightly over half a mile away from us at the time. We determined the position of her when she was first sighted by our own known position at the time and we of course steered from there to meet her.

Q. 25. And did you determine that position in that way?

A. We determined the position.

Q. 26. And what was that?

A. When she was first sighted?

Q. 27. Yes.

A. That was her position when she was first sighted that I gave you before—the Tucker's position—did I give the Tucker's position?

Mr. Fitzpatrick: Yes.

A. That was near it. I will have to step off the stand—I can give you the exact position at the time we sighted the position of the Mazel Tov. The position I gave before was the position of the Mazel Tov at the time. Change that to the position of the Mazel Tov when first sighted by the Tucker.

Mr. Fitzpatrick: That was 41 degrees, 9 minutes, 35 seconds; that was the Mazel Tov, not the Tucker?

The Witness: Yes, the position of the Mazel Tov when first sighted.

Q. 28. Now, what was the position of the Tucker when you first sighted the Mazel Tov?

A. Have you a pair of dividers? 41 degrees, 10 minutes, north latitude, 70 degrees, 37 minutes, 45 seconds west longitude.

Q. 29. Now, did you signal to stop her when she was about to be overhauled?

A. Yes, sir.

Q. 30. What was the signal?

A. We were close aboard her on her port quarter. We used the megaphone first to hail her. The master sung out: "I do not understand you; I cannot hear you." So we then blew the whistle, whereupon she stopped.

Q. 31. And did you take her position then?

A. We took the time that we stopped.

[fol. 23] Q. 32. What was that?

A. At 6.05 we were drifting alongside of her; then we measured her time and position—the time ran—the time run, and speed we were making measured our position then on the chart.

Q. 33. And what was that?

A. That was 41 degrees, 8 minutes and 47 seconds—46 seconds—45 seconds, the halo of 45——

[Stenographer reporting for defense: "Well which is it?"]

A. Make it 45 seconds north, 70 degrees, 36 minutes, 30 seconds, west longitude. The other was north latitude.

Q. 34. That is the position of the Mazel Tov?

A. When she was overhauled and we stopped alongside of her.

Q. 35. And did you figure how far she was from the nearest point of the coast line?

A. 10⅞ miles.

Mr. Fitzpatrick: 10⅞ miles?

The Witness: 10⅞ miles.

Q. 36. And that was what land?

A. No Man's Land, Massachusetts.

Mr. Fitzpatrick: That is the Mazel Tov?

The Witness: The Mazel Tov, her position when we stopped alongside of her.

Q. 37. And the time was?

A. 6.05.

Q. 38. 6.05; and how long did you stay beside her, or how long were you attempting to board her?

A. We spotted her position, and by the time we got aboard of her it was sometime later—around twenty-five minutes, I think—[reading from log: "6.40 p. m. boarding party on board Mazel Tov."]

Q. 39. And during that time the engines of both ships were stopped—the engines were stopped?

A. Yes.

Q. 40. And you were both drifting?

A. We were both drifting; yes, sir.

Q. 41. How was the wind?

A. The wind was northwest by north, which is a speed of thirteen statute miles per hour; velocity of thirteen miles per hour.

[fol. 24] Q. 42. And what was your drift due to the wind?

A. That was earlier here, at 6 o'clock, north northwest.

Q. 43. What is the change you are making?

A. It was north northwest at 6 o'clock.

Q. 44. The wind?

A. Yes; north northwest at six o'clock.

Q. 45. What was your drift, due to the wind?

A. Approximately——

Mr. Fitzpatrick: Just a minute. I object to that question in that form.

Mr. Boss: It may become material.

The Court: Is this after the coast guard had boarded the vessel Mazel Tov?

Mr. Boss: Yes.

The Court: Does that make any difference?

Mr. Boss: As I say, after—it is during the time they were drifting——

Q. 46. How long before you got under way?

The Court: The point you want to bring out is, they didn't drift outside the boundary.

Mr. Boss: I want to show what the drift was and when it was, in anticipation of the defense here, as set up by the answer.

A. We laid——

The Court: I will sustain the objection unless you can show me where it has some bearing. The question is where they boarded the boat. Where they drifted to after, I don't see as it makes any difference.

Mr. Boss: It doesn't under the status of the testimony at present. We will see if it does and then I will renew the question.

Q. 47. Did you go on board the Mazel Tov—were you a boarding officer?

A. Yes, sir, I was a boarding officer.

Q. 48. And what cargo did you find?

A. I went on board the Mazel Tov and asked for her registry, manifest, clearance papers and crew list.

[fol. 25] Q. 49. Were those furnished?

A. They were furnished and produced, and I read them over; and I looked on her manifest to see how much cargo and what cargo she had on board.

Mr. Fitzpatrick: She had a manifest?

The Witness: She had a manifest.

Q. 50. I show you this document. Is this the manifest that the master produced?

A. Yes, sir, this is the manifest produced.

Mr. Boss: I ask that this be introduced in evidence as Libellant's Exhibit 1.

The Clerk: Marked "United States 1."

Q. 51. Did you examine the cargo to see if it complied with the manifest?

A. According to the manifest there is no amount of cargo shown; it is merely "one lot". I asked the master if I could look in his hatches. He immediately pulled off a tarpoon on the front hatch and lifted the hatch covers.

Q. 52. Was the hatch filled before he did that?

A. The hatch was not filled.

Q. 53. What cargo did you find?

A. I looked down the hatch and found many burlap sacks marked "William Penn". I made an estimate—I tried to make an estimate of the amount contained in there, and the master said: "I have the rest of the liqueur aft."

Mr. Fitzpatrick: "I have the rest of the liquor aft"?

The Witness: Yes, "I have the rest of the liqueur aft"—he prouounced it "liqueur".

Mr. Fitzpatrick: French.

Q. 54. What did you—strike that out. Did you find any other alleged manifest on board?

A. While searching——

Mr. Fitzpatrick: Just a minute.

Q. 55. Yes or no?

A. Yes, sir.

Q. 56. I show you a document marked "Manifest"; did you find that on board?

A. Yes, sir.

[fol. 26] Q. 57. And is that sealed?

Mr. Fitzpatrick: Just a minute. I object.

The Court: What is the question?

Mr. Boss: "Is that manifest sealed?"

Mr. Fitzpatrick: It isn't sealed and it isn't a manifest.

The Court: It shouldn't be sealed.

Mr. Boss: I offer this in evidence.

The Court: It was found on board the boat, that is the testimony?

Mr. Fitzpatrick: I object to the term "manifest".

The Court: It may be offered as a document found on board the boat.

The Clerk: United States Exhibit 2.

Mr. Boss: Libellant's Exhibit 2.

The Court: Have you the other one?

The Clerk: No; Mr. Boss has Exhibit 1.

Q. 58. I show you a document marked "Agreement or Articles and Account of Crew"; is that document one that you received from the master at that time?

A. Yes, sir.

Mr. Boss: I ask that this be marked—I offer this in evidence and ask that it be marked "Libellant's Exhibit 3."

Mr. Fitzpatrick: I object. There is no right shown here as yet for the coast guard officer to take anything from that boat.

The Court: That may be admitted.

Mr. Fitzpatrick: Exception.

[Libellee's exception noted.]

Q. 59. I show you a clearance document——

The Court: These documents are only admitted, Mr. Fitzpatrick, de bene, for such light as they will throw.

Q. 60. Did you receive that clearance document from the master at that time?

A. Yes, sir.

Mr. Boss: I offer this in evidence as Libellant's Exhibit No. 4.

[It is so marked.]

[fol. 27] Q. 61. I show you the document called "Certificate of British Registry"; is that a document you received from the master when you boarded the Mazel Tov?

A. Yes, sir.

Mr. Boss: I offer this in evidence as Libellant's Exhibit No. 5.

[It is so marked.]

Q. 62. Did you take the "Work book of sights" off the Mazel Tov?

A. No, sir, I did not take it. The deputy inspector at Boston took them off. I saw them on board the ship.

Q. 63. You saw the "Work book of sights" on board the Mazel Tov?

A. Yes.

[No questions 64 to 69.]

Q. 70. Did you have any conversation with the master as to the speed of the Mazel Tov?

A. He was on board the Tucker being questioned by the deputy inspector—what is his name?

Q. 71. Kahler?

A. No. Kearns.

Q. 72. Kearns.

Mr. Fitzpatrick: Who else was there?

The Witness: Kahler, Lieutenant Commander Sexton, Ensign Ross and myself.

Q. 73. Did he state what the speed of the Mazel Tov was?

A. He stated that she was—could make eleven knots.

Mr. Fitzpatrick: What is that?

The Witness: He stated that she could make eleven knots.

Q. 74. Mr. Lawson, assuming the weather conditions to have been as stated by you when you sighted the Mazel Tov and assuming that the Mazel Tov could travel eleven knots

an hour, in your opinion could she reach—could she have reached the coast of the United States within——

Mr. Fitzpatrick: Just a minute.

Q. 75. —one hour, from her position?

Mr. Fitzpatrick: I object to that "when you first sighted her"—I object.

[fol. 28] The Court: On what ground?

Mr. Fitzpatrick: The position the boat was in when he first sighted her at best was a guess. If he wants to ask from the position the Mazel Tov was in when he was alongside, I don't object.

Mr. Boss: I may ask both questions, but I want to ask this one first.

Mr. Fitzpatrick: I object to that one.

The Court: He may answer.

A. I believe she could from the first one.

Mr. Fitzpatrick: You what?

The Witness: I believe she could from the first one—I will check it.

The Court: The witness has already testified where he first saw them and the point also where they boarded her, now what has he to figure? It is a question of the witness' opinion, if the speed of the vessel were eleven knots—can't you answer that without figuring?

The Witness: Yes, sir.

The Court: What is the answer?

The Witness: Yes, sir; I just wanted to check myself.

Cross-examination.

By Mr. Fitzpatrick:

X Q. 76. How long have you been in the coast guard, lieutenant?

A. I was appointed a cadet in the United States Academy in 1922.

X Q. 77. That is the Coast Guard Academy at New London?

A. Yes, sir.

X Q. 78. And on the night in question—now, lieutenant, will you take those dividers and locate for me a point about 97/8 miles from No Man's Land?

A. Any point?

X Q. 79. Locate a point 9⅞ miles from No Man's Land.
A. [The witness points to chart.]
X Q. 80. Any place within a circle is 9⅞ miles?
A. Yes.
X Q. 81. It might be a point up in Vineyard Sound; is that correct?
A. Yes, sir.
[fol. 29] X Q. 82. Where did you center that from, from the center of No Man's Land?
A. No; from the edge.
X Q. 83. So it practically makes a circle?
A. Practically.
X Q. 84. And what would the diameter of that circle be?
A. Two times 9⅞.
X Q. 85. Approximately two miles?
A. Approximately.

[No cross-question 86.]

X Q. 87. Who boarded that vessel with you?
A. Ensign Ross.
X Q. 88. Ensign Ross?
A. Yes.
X Q. 89. And how long were you aboard the vessel??
A. Roughly fifteen or twenty minutes.
X Q. 90. And during that time did you talk to Captain Cook?
A. Yes.
X Q. 91. And Captain Cook produced a manifest?
A. He gave me a paper with "Manifest" written at the top.
X Q. 92. It was sealed?
A. Sealed.
X Q. 93. And do you know all the destination was in that manifest?
A. Nassau.
X Q. 94. Nassau, and what else?
A. And the high seas—I am not sure; I think it was written in ink.
X Q. 95. Nassau——

The Court: That speaks for itself.
Mr. Fitzpatrick: Yes, but I want him to see it.

A. I remember seeing it, but I couldn't read it. I believe that means "high seas" [indicating manifest]; I don't know.

X Q. 96. And how long was the Tucker alongside before a boarding party was put on the Mazel Tov?

A. As I said before, roughly thirty or forty minutes.

X Q. 97. Roughly thirty or forty minutes?

A. Yes.

X Q. 98. And who was that in charge of?

A. As I stated before, I was in charge of boarding——

X Q. 99. You were in charge of the boarding party?

A. Yes, sir.

[fol. 30] X Q. 100. And later on another crew went aboard, didn't they, after the seizure?

A. Yes, sir.

X Q. 101. And who was in charge of that crew?

A. Ensign Richard M. Ross.

X Q. 102. And how many more?

A. Roughly eight or ten men.

X Q. 103. Eight or ten men. Where did the crew of the Mazel Tov remain?

A. I do not know, sir; I was not over there at the time. They remained on board the vessel.

X Q. 104. When did you take Captain Cook over to the Tucker?

A. At the Providence harbor.

X Q. 105. Not until you got to the Providence harbor?

A. No, sir.

X Q. 106. Let me see, what day was that?

A. That we were on board?

X Q. 107. What day did you interview Captain Cook in the Providence harbor?

A. November 3d.

X Q. 108. And when did they seize the boat?

A. November 1st.

X Q. 109. And from November 1st to November 3d, up to the time you arrived at Providence, you didn't question Captain Cook?

A. I did not; no sir.

X Q. 110. Or any members of the crew?

A. I did not; no sir.

X Q. 111. Tell us what you were doing all this time from November 1st to November 3d.

A. We got under way around 8.30 or 8.40 the night of November 1st. We proceeded at a slow speed in the direction of No Man's Land.

X Q. 112. How slow?

A. Five—six knots.

X Q. 113. Six knots? A. Roughly six knots.

X Q. 114. Yes——

A. In the direction of No Man's Land gas buoy. We then laid a course from there to the northern point of Block Island.

X Q. 115. Yes; when did you arrive there?

A. While we were proceeding on this course——

[fol. 31] X Q. 116. When did you arrive there?

A. In Block Island?

X Q. 117. Yes.

A. The morning—around noon of the next day, the 2d.

X Q. 118. Sunday?

A. November 2d.

X Q. 119. Sunday?

A. Yes the 1st was Saturday—the next day.

X Q. 120. And what did you do after that?

A. We proceeded to Providence.

X Q. 121. And what time did you arrive in Providence?

A. I can tell you exactly—we arrived here that night—that afternoon at 3.58, we stopped and anchored in thirty feet of water in Providence harbor.

X Q. 122. That is Sunday?

A. Sunday noon.

X Q. 123. So from 6.05 the time of the seizure to 3.30 Sunday afternoon you had this boat in tow?

A. Yes, sir.

X Q. 123. Did you request Captain Cook at the time of seizure to get under way himself?

A. I asked if he would; yes, sir.

X Q. 125. What did he say?

A. He said no, he would not get under way.

X Q. 126. So you put a line on?

A. We put a line on.

X Q. 127. You ordered a line on and started to tow?

A. Yes, sir.

X Q. 128. On November 3d you say you and others had a conversation with Captain Cook; tell us what that conversation was.

A. I cannot tell it verbatim.

X Q. 129. Give us your best recollection of it?

A. I didn't conduct the questioning.

X Q. 130. Who did conduct the questioning?

A. Deputy Inspector Kearns.

X Q. 131. Kearns?

A. Yes.

X Q. 132. The customs man?

A. Yes, sir.

X Q. 133. But you were there all the time?

A. I was around there; yes, sir; listening in at times.

X Q. 134. How many times did the inspector ask Cook [fol. 32] how fast the Mazel Tow traveled?

A. To the best of my recollection he asked him how much speed she would make and Captain Cook replied nine or ten knots.

X Q. 135. Nine or ten knots?

A. Yes.

X Q. 136. Not eleven?

A. Just one moment, please. He then asked him: "She can make eleven knots?" And Captain Cook said: "Yes." He then asked Captain Cook if she could make twelve knots, and the captain said: "No, she has never made twelve, according to my log."

X Q. 137. But first he said she could make eight or nine knots?

Mr. Boss: He didn't say that.

X Q. 138. Or nine or ten knots?

A. Nine or ten knots.

X Q. 139. And when the deputy inspector asked the captain how many knots that boat could go, did he specify under what conditions?

A. No, sir, he did not.

X Q. 140. When he asked Captain Cook if that boat could go a certain number of knots, did he specify the conditions that existed at the time of the seizure by the Tucker on November 1st?

A. No, sir.

X Q. 141. Did your deputy inspector ask Captain Cook how fast the boat could go if there was a—if a strong offshore wind was blowing?

A. No, sir.

X Q. 142. Did he ask Captain Cook how fast that boat could go running against the tide?

A. No, sir.

X Q. 143. And now, lieutenant, what time did it get dark on the night of November 1st?

A. Around 5.30.

X Q. 144. Around 5.30?

A. Five o'clock.

X Q. 145. And what time did you see the Mazel Tov?

A. I first saw her at five minutes of six.

X Q. 146. Were you on the bridge?

A. Yes, sir.

X Q. 147. How high is that bridge, by the way, from the water line?

A. Thirty-two feet.

X Q. 148. Thirty-two feet. Can you tell how high the bridge of the Mazel Tov was approximately?

[fol. 33] A. There were two places of measuring on her that you might call the bridge.

X Q. 149. Well, take the highest point of the boat, how did it compare with the Tucker?

A. About fifteen feet.

X Q. 150. About fifteen feet?

A. Yes.

X Q. 151. And you were thirty-two?

A. Yes.

X Q. 152. Do you know where Gay Head light is?

A. Yes.

X Q. 153. And when you stopped the Mazel Tov did you take bearings?

A. I did not; no, sir.

X Q. 154. Did you have any conversation with Captain Cook relative to the light at Gay Head?

A. Yes, sir.

X Q. 155. What did he tell you?

A. He said he couldn't see it.

X Q. 156. Did you go on his bridge to see if you could see it?

A. I did not.

X Q. 157. You could see it from your bridge?

A. We could see it very, very plain.

X Q. 158. Because you were thirty-two feet up?

A. Yes, sir.

X Q. 159. How far is it from the point of seizure to Gay Head light, nineteen miles?

A. Sixteen miles.

X Q. 160. Sixteen miles?

A. Yes, sir.

X Q. 161. And who did take the bearings from Gay Head light on your boat?

A. I believe the commanding officer did.

X Q. 162. Commander Sexton?

A. Yes, sir.

X Q. 163. You don't know what time he took those bearings?

A. No, sir, I do not.

X Q. 164. Outside of Gay Head light were any other lights visible?

A. Not as I recall.

X Q. 165. So that the only light visible upon which a person could take bearings at the time of seizure was Gay Head light?

A. Yes, sir.

X Q. 166. And Captain Cook said he couldn't see it?

A. He said he could not.

[fol. 34] X Q. 167. You didn't go up to see if you could?

A. No, I didn't go up; I sent someone up.

X Q. 168. Who did you send?

A. Mr. Ross.

X Q. 169. You said Mr. Ross was in charge of the detail aboard the Mazel Tov at the time it was being towed?

A. Yes, sir.

X Q. 170. Did you see a log line on that boat, the Mazel Tov?

A. I did not; no, sir. I understood they had one out.

X Q. 171. You understood they had one out?

A. Yes, sir.

X Q. 172. Did you take any soundings?

A. The commanding officer did, I didn't.

X Q. 173. Were you there?

A. No, sir; I was on the boarding party.

X Q. 174. And do you know what the distance was from the Tucker to the Mazel Tov at the time the lieutenant commander was taking these soundings?

A. Approximately half a mile.

X Q. 175. Now lieutenant, half a mile nearer the shore or out from the shore?

A. Out from the shore.

X Q. 176. And on the port or starboard side?

A. Of what?

X Q. 177. Of the Mazel Tov.

A. On the port side.

X Q. 178. On the port side. Wasn't there more conversation you had with Captain Cook when you first boarded that boat than you have already told us?

A. In regard to what, sir.

X Q. 179. Isn't it a fact Captain Cook said, after you started your conversation, that he wasn't within the twelve mile limit?

A. He said he believed he wasn't inside the twelve mile limit.

X Q. 180. Did you say to Captain Cook, "I think you are; I think you are eleven and a half miles"?

A. I do not recall that exactly.

X Q. 181. And did you say to Captain Cook, "Well, according to our reckoning you are about eleven and a half miles"?

A. I do not recall that.

[fol. 35] X Q. 182. You wouldn't say whether you did or didn't?

A. No, sir.

X Q. 183. Captain Cook said he didn't believe he was in the twelve mile limit?

A. Yes, sir.

X Q. 184. Are you sure he said that, or that he wasn't within the twelve mile limit?

A. I don't recall whether he made a positive declaration or whether he assumed that he was not.

X Q. 185. Now, were you the first one on board the Tucker who saw the Mazel Tov?

A. No, sir; the first class quartermaster saw her.

X Q. 186. He was on watch?

A. Yes, sir.

X Q. 187. Is he here?

A. No, sir.

X Q. 188. And it was called to your attention?

A. Yes, sir.

X Q. 189. Now you are quite positive that the Mazel Tov was running without lights?

A. Yes, sir.

X Q. 190. You are positive of that?

A. There were no lights visible.

X Q. 191. Well if the Mazel Tov was turning or you were turning stern to, could you see the Mazel Tov's lights?

A. I don't understand your question.

X Q. 192. Suppose the Mazel Tov was running in this direction [indicating] and the Tucker was in back of it, could you see the kind of lights they have on the Mazel Tov if she was stern to you?

A. Normally yes; I have seen them on her before.

X Q. 193. Speaking of lights, did you have any lights on?

A. We did not have lights on.

X Q. 194. And you came alongside of this boat and put your search light on?

A. Yes, sir.

X Q. 195. Were you running the search light?

A. No, sir,

X Q. 196. How long after you put your search light on the boat did you hail her?

A. Immediately.

X Q. 197. As soon as you put your search light on?

[fol. 36] A. As soon as we could make out the name on her stern; yes, sir.

X Q. 198. How far off were you when you could make out the name?

A. We were close aboard her at that time.

X Q. 199. And the first time you knew what boat it was, was when you got up there?

A. Yes, sir; the first time we knew was when we got up there.

X Q. 200. At any time, lieutenant, did you see, on the day of the seizure, any small boats making contact with the Mazel Tov?

A. No, sir.

X Q. 201. At any time on the day of the seizure did you see the Mazel Tov within the three mile limit of the United States?

A. No, sir.

X Q. 202. At any time on the day of the seizure did you see the Mazel Tov unload any cargo?

A. No, sir.

X Q. 203. At any time on the day of the seizure did you see the Mazel Tov within any port of the United States?

A. Any port?

X Q. 204. Yes, sir.

A. No, sir.

X Q. 205. But did you see a manifest, in French?

A. A document marked "Manifest" which did not have the amount of the cargo she had on board.

X Q. 206. With a diversified cargo of merchandise; is that correct?

A. "One lot", I believe.

X Q. 207. One lot of diversified merchandise; is that correct? [Indicating manifest.]

A. If I translate that correctly, it is.

X Q. 208. When you first sighted the Mazel Tov you testified to Mr. Boss that you couldn't tell the exact position of the Mazel Tov, you guessed it was about half mile; is that correct?

A. Yes, sir.

X Q. 209. How did you arrive at that conclusion?

A. Regarding the limit of visibility.

X Q. 210. The visibility of what?

A. The limit of visibility.

[fol. 37] X Q. 211. The limit of visibility was about half a mile, was it, that night?

A. Roughly half to three-quarters of a mile, as I stated before.

X Q. 212. Oh, did you ever see the log line of the Mazel Tov at a point about half a mile southeast of No Man's gas buoy?

A. I saw the log which showed that she was taking the beam of No Man's gas buoy, which is southwest.

X Q. 213. Southwest—about how far off to No Man's?

A. I don't know, sir.

X Q. 214. Tell us, will you, how far that gas buoy is off No Man's Land—two miles I think.

A. Less than two and a quarter miles.

X Q. 215. Less than two and a quarter miles, and you saw the log line at that time?

A. No, I did not see the log until it was produced in—showed to me by Captain Cook when we got up into Providence harbor.

X Q. 216. And what did it read?

A. It read a "scant 13.2 miles."

X Q. 217. It read a "scant 13.2 miles"; do you know when that log was thrown down?

A. No, sir.

X Q. 218. Or you don't know when it was picked up?

A. No, sir.

X Q. 219. But when you saw it it was 13.02 scant?

A. No; 13.2 scant.

X Q. 220. Then assume that a log line was thrown over at the time you started to tow the Mazel Tov and that that log line was picked up at a point about half a mile from the gas buoy off No Man's Land and the log read 13.2, what would that mean to you?

A. That it was the distance covered by the Mazel Tov minus any correction she may have had in her log line from the time the log was first thrown overboard until it was read.

X Q. 221. Now, lieutenant, you are familiar with log lines?

A. Yes, I am.

X Q. 222. Isn't a fact that when a vessel is being towed or [fol. 38] when a vessel is under way at a speed of four or five knots, that the log will not register as accurately as it would if the boat or vessel was going at a greater rate of speed?

A. I have never found that to be the case; no, sir; only at high speeds.

X Q. 223. Only at very high speeds; isn't it a fact, lieutenant, that the condition of the sea has some effect on a long line?

A. Practically none whatever.

X Q. 224. By the way, when you were towing the Mazel Tov in how was the sea?

A. The sea had picked up.

X Q. 225. Quite choppy?

A. Quite choppy; the wind had increased.

X Q. 226. Was the wind still blowing off-shore?

A. Yes, sir.

X Q. 227. Do you know how the tide was then?

A. It is hard to state the tide on account of the wind around No Man's Land.

X Q. 228. Well, is it pretty generally a good supposition to make, if there is a strong off-shore wind and the sea is choppy, that the tide is running in against the wind?

A. No, sir, not at that point.

X Q. 229. Not at that point?

A. No, sir.

X Q. 230. Not at any of those points at which you towed? A. Not until we got to No Man's gas buoy.

X Q. 231. How was it at No Man's gas buoy?

A. It would run northeast and southwest in there.

X Q. 232. If I remember, lieutenant, you did not take any soundings at all?

A. I did not; no, sir.

Mr. Fitzpatrick: That is all.

Redirect examination.

By Mr. Boss:

Q. 233. Mr. Lawson, do you know whether the port holes of the Mazel Tov were closed or blocked in any way?

Mr. Fitzpatrick: Just a minute; I object to that. What has that got to do with it?

[fol. 39] The Court: I don't know about what half this testimony so far has to do with it.

Mr. Boss: There has been some cross-examination about whether the boat was dark or not, and particularly what point of land the master of the Mazel Tov could see or couldn't see. Now if the port holes were clogged, he couldn't see any point of land, perhaps.

Mr. Fitzpatrick: They weren't running a blind ship.

The Court: I don't see what the port holes have to do with visibility.

Mr. Boss: I was going to follow it up with other parts of the ship.

The Court: Let's not spend too much time on it.

Q. 234. Any portion of the ship, did you observe, that was blocked or in any way screened so the light couldn't get out?

A. Yes, sir.

Q. 235. What portions?

A. The deck house; the sides and stern of the deck house were battened down with wooden doors.

Q. 236. You have been referring during the progress of your testimony to a chart. Are the pencil markings on this chart yours?

A. Some of them are; yes, sir.

Q. 237. And this is the chart that you have used in referring to the positions of the two ships?

A. Yes, sir.

Mr. Boss: I offer this in evidence—it may aid the defendant——

Mr. Fitzpatrick: I object.

Mr. Boss: —as Libellant's Exhibit 6.

Mr. Fitzpatrick: I object on the ground of lack of proof.

The Court: Is it an official United States map?

Mr. Fitzpatrick: I object to the markings on it. I don't object to the chart itself, but he says only some of the markings are his.

The Court: When he finishes his testimony he can indicate the marks that are his marks, so that if we want to read [fol. 40] his testimony we will understand them. I don't want to take the time now, however.

FLOYD J. SEXTON (sworn)

By Mr. Boss:

Q. 1. Were you in command of the Tucker on November 1, 1930?

A. Yes, sir.

Q. 2. And what was your designation?

A. Lieutenant Commander Floyd J. Sexton.

Q. 3. Who determined the positions of the Tucker and the Mazel Tov, the positions having been testified to by Mr. Lawson?

A. Mr. Lawson and the navigator determined the positions, which were checked by me.

Q. 4. And were they checked on this chart that we have just offered in evidence?

A. Yes, sir.

Q. 5. They were. Referring to this chart, have you any addition to make to Mr. Lawson's testimony?

A. In regards to what, sir?

Q. 6. Anything. Did he state the positions correctly, as checked by you?

A. Yes, sir.

Q. 7. Did you go on board the Mazel Tov?

A. I did not.

Q. 8. Did the master make any objection to having your men board her?

A. No, sir.

Q. 9. Did you turn over the cargo to the collector of customs in the port of Providence?

A. Yes, sir, I did.

Q. 10. And that cargo consisted of what?

A. Approximately two hundred cases of intoxicating liquor.

Q. 11. And you delivered the boat, the Mazel Tov herself, to the collector?

A. Yes, sir, I did.

Q. 12. Had you trailed the Mazel Tov before November 1st?

A. Yes, sir.

Cross-examination.

By Mr. Fitzpatrick:

X Q. 13. Did you speak to the Mazel Tov commander that night when you drew alongside?

A. Yes, sir, I did.

X Q. 14. Through a megaphone?

A. Yes, sir.

[fol. 41] X Q. 15. You had a conversation with the man you now know as Captain Cook?

A. Yes, sir.

X Q. 16. Tell us what that conversation was, please.

A. Well, there was quite a bit of it——

X Q. 17. Especially the conversation relative to the position of the boat.

A. I told him that according to my reckoning he was inside the twelve mile limit.

X Q. 18. And you told him the distance, didn't you?

A. I don't recall.

X Q. 19. Didn't you tell him eleven and a half miles, according to your reckoning?

A. Yes, I think I did say it was.

X Q. 20. What did he say it was, do you recall?

A. Well, he said he didn't think he was inside.

X Q. 21. Did he say he didn't think or that he wasn't inside the twelve mile limit, commander?

A. Well, I wouldn't say which he said.

X Q. 22. But you did tell him he was eleven and a half miles off-shore?

A. Yes, about.

Mr. Fitzpatrick: All right. That is all.

ENSIGN RICHARD ROSS (sworn).

By Mr. Boss:

Q. 1. Did—what is your position?

A. Watch officer.

Q. 2. On board the Tucker?

A. Yes, sir.

Q. 3. And you were watch officer on board the Tucker on November 1st?

A. I was.

Q. 4. Did Captain Cook ask you to read the taffrail meter log?

A. Yes, sir.

Q. 5. And did he show you the reading before you started from a position where she was seized?

A. After she started.

Q. 6. After you started?

A. Yes.

Q. 7. And what was it then?

A. Zero.

Q. 8. Zero, and what was it when you came to No Man's Land?

A. When we were abeam of No Man's Land gas buoy, or when we were by the beam, I was watching the compass to [fol. 42] see when we got abeam and when we got abeam we went back and read it again and I read 13.1—a little bit over that.

Q. 9. Did that indicate you had gone a fraction over thirteen miles in that time?

A. Yes, sir.

Q. 10. Between the two positions?

A. Yes, sir.

Q. 11. And how do you account for that? Aren't you—do you know when the Mazel Tov was boarded what her distance was from land?

A. No, sir; I didn't check it.

Q. 12. You didn't check it?

A. No, sir.

Q. 13. You have heard it said here, have you not, what it was?

A. Yes, sir.

Q. 14. And how do you account for the difference? Mr. Ross, what experience have you had in the reading taffrail meter logs?

A. I made two European cruises and took watches as quartermaster and read the log every hour at certain times during these cruises. That is actual experience, and——

[No question numbered 15.]

Q. 16. You know, of course, when a vessel is drifting and when she isn't of course?

A. Yes, sir.

Q. 17. And can you compute the drift?

A. The drift of a vessel?

Q. 18. Yes.

A. Yes, sir. I would say that during the time, from the time we were along side the Mazel Tov until we got under tow, that we drifted off-shore and southeast approximately two miles or more and that that 13.1 approximately, a little over, was due to the distance we covered on the—from the time we took her in tow till we were by the beam—of course that is counting any correction that might be in the log.

Q. 19. So that that doesn't mean that the Mazel Tov was more than thirteen miles from shore at the time you made the seizure?

A. No, sir.

[fol. 43] Cross-examination.

By Mr. Fitzpatrick:

X Q. 20. How far is it from the gas buoy to No Man's Land?

A. From the gas buoy to No Man's Land?

X Q. 21. Yes, sir.

A. Less than two and a quarter miles.

X Q. 22. Less than two and a quarter miles; so that from the point the Mazel Tov was towed by the Tucker to abeam of the gas buoy was 13.1 according to the log—correct?

A. From where we took her in tow until we were abeam of the gas buoy.

X Q. 23. Was 13.1 or 2?

A. 13.1—between 1 and 2.

X Q. 24. Between 1 and 2, and now the distance from where the log line was taken up abeam the gas buoy you say to No Man's Land is how far?

A. From where the log line was taken up to No Man's Land.

X Q. 25. Two and a half miles?

A. Yes, sir.

X Q. 26. Making a total of what?

A. Oh, you can't add it up that way.

X Q. 27. I am asking what that totals?

A. If you add 13.1 and 2½, that would be 15.3.

X Q. 28. And the shore of No Man's Land was the near-east point of land, wasn't it, from the place of seizure?

A. I don't know; the commanding officer attends to that; we don't have anything to do with it.

X Q. 29. Of course the gas buoy isn't land, is it?

A. No.

Redirect examination.

By Mr. Boss:

Q. 30. Mr. Fitzpatrick has asked you about the distance from the point when you were abeam the gas buoy to the gas buoy and you said it was two and a half miles?

A. From No Man's Land to the gas buoy.

Q. 31. From No Man's Land to the gas buoy?

A. Yes, sir.

Q. 32. And the distance from the point where you made the seizure to No Man's Land would compare how, with the distance from the point where you made the seizure to the [fol. 44] point abeam of No Man's Land—the gas buoy?

A. Well——

Q. 33. You have a triangle there, haven't you?

A. We have a triangle—I can show you on the chart there.

Q. 34. Well, would you add that two and a half miles to the distance?

A. No, you wouldn't.

Q. 35. From the point of seizure to the gas buoy?

A. No, sir.

Q. 36. No.

The Court: I am trying to figure out how the gas buoy comes in. They have logged the distance from the point of seizure to the gas buoy.

Mr. Boss: Yes.

The Court: What was the purpose of going to the gas buoy if that wasn't in the direction of land?

Mr. Boss: It was. My point is the distance is the same from the point of seizure to the gas buoy as it is to land. That is, the triangle is such that the two long legs are the same.

Q. 37. Would you say they were the same, Mr. Witness?

A. Yes, sir.

Recross-examination.

By Mr. Fitzpatrick:

X Q. 38. Do you know what course the Tucker chartered from the point of seizure?

A. What course?

X Q. 39. Yes.

A. No, sir. What course she steered from the point of seizure in?

X Q. 40. Yes.

A. No, sir, I don't.

X Q. 41. You don't know if it was 297 degrees?

A. I know it approximately, but I don't know the exact.

X Q. 42. What was it approximately?

A. All I had to go by was the compass on the Mazel Tov and I don't know what the air is in it—it was approximately around northwest.

X Q. 43. Northwest, north.

A. I wouldn't say.

[fol. 45] X Q. 44. How long have you been in the coast guard, lieutenant?

A. Four years.

X Q. 45. And before you were in the coast guard, did you have any experience on vessels of any kind?

A. No, sir.

X Q. 46. So your total experience on the water is four years?

A. Well, I have been in the coast guard four years.

X Q. 47. That is your experience on navigating vessels?

A. Yes, sir.

X Q. 48. Or reading log lines?

A. Yes, sir.

X Q. 49. And in the coast guard do you read the log?

A. Do I read the log?

X Q. 50. The only time you ever read a log was on your two trips to Europe?

A. No, sir; I have read it other times than that.

THOMAS F. HULL (Sworn).

By Mr. Boss:

Q. 1. Mr. Hull, you are Deputy Collector of Internal Revenue—of Customs?

A. Assistant collector, Mr. Boss.

Q. 2. In the port of Providence?

A. Correct.

Q. 3. And did you handle the matter of the adoption—of the seizure of the Mazel Tov?

A. I didn't understand the question.

Q. 4. Did you handle the matter of adoption and seizure of the Mazel Tov in your office?

A. Yes, I did.

Q. 5. And you did adopt the seizure—you took the vessel in your custody?

A. Yes.

Q. 6. And you took the cargo?

A. I did.

Q. 7. And of what did the cargo consist?

A. The cargo consisted of 403 sacks and six loose bottles of foreign intoxicating liquors.

Q. 8. Did you appraise the vessel?
A. Yes, sir.
Q. 9. What is the valuation?
A. $32,000.
Q. 10. And did you appraise the liquors?
A. Yes, sir.
Q. 11. What is their value?
A. $14,286.18. * * *
[fol. 46] Q. 12. I show you report of seizure—I think I won't introduce that. Did you take samples of the liquors?
A. Yes, sir.
Q. 13. And are these samples which you took from that cargo?
A. They are.
Q. 14. To whom did you hand these samples for analysis?
A. I handed them in to Mr. Morawski's office, but he wasn't there.
Q. 15. And Mr. McLean of his office was there?
A. No; another gentleman was there, I don't know his name. He is usually there in that office.
Q. 16. Did you make any assessment of penalties against the Mazel Tov?
A. Yes, sir.
Q. 17. Have you a copy of that?
A. Yes; right here.
Q. 18. Will you read it?
A. —

November 18, 1930.

Frank Cook, master of British motorship Mazel-Tov, % Joseph E. Fitzpatrick, attorney, 317 Hospital Trust Bldg., Providence, R. I.

SIR: You are hereby notified that the above-named vessel has become liable to a penalty for violation of an Act of Congress as follows:
Tariff Act of 1930, Sec. 584, Falsity of Manifest, $14,286.18, also for violation of an Act of Congress as follows:
Tariff Act of 1930, Sec. 584, Lack of Manifest,"——

The Court: How could you have a falsity of manifest and lack of manifest?

Mr. Boss: I explained that, or attempted to, so far as the allegation of no manifest is concerned we were following the ruling of Judge Morton in The Irene C, when he said if

a manifest didn't have all the legal requirements, it was a nullity and no manifest, and that is the reason for that particular item.

[fol. 47] The Court: Doesn't the logic of it bother you any?

Mr. Boss: I don't care much about it, because the other cause is good.

A. Shall I continue?

Q. 19. Yes.

A. —

—"also Tariff Act of 1930, Sec. 585, Attempting to Depart before Report of Entry, $5000.00.

These violations occurred November 1, 1930 at, to wit, 6:05 p. m. in latitude 41° 68′ 45″ N and longitude 70° 36′ 36″ W, within a collection district of the United States, said vessel having thereafter been arrested by Customs and Coast Guard officers and brought to the Port of Providence.

Respectfully, Emery J. San Souci, Collector of Customs."

Q. 20. Did you send that postpaid to Captain Cook?

A. Yes, sir.

Q. 21. By mail?

A. By mail; yes, sir.

Q. 22. And have the penalties which were assessed by your office been paid?

A. They have not. * * *

Cross-examination.

By Mr. Fitzpatrick:

X Q. 23. Heading that letter is there anything in there about an assessment of damages or penalties? Does it say in there, under the various sections of the Tariff Act, "You are hereby assessed so much money in penalties"?

A. The amounts are stated against each section.

X Q. 24. Is says "You are hereby notified that the above named vessel has become liable to penalty for acts of as follows"—isn't that what it says?

A. Yes.

X Q. 25. It doesn't say anything about assessing any damages?

A. It is a notification that they are liable to those penalties.

X Q. 26. It is a notification there is liable to be penalties —it doesn't assess any penalties?

A. I think it does.

[fol. 48] X Q. 27. How do you know, or can you tell us how the figure of $14,286.18 was arrived at?

A. Yes, sir.

X Q. 28. And can you tell us what it was arrived at for?

A. I didn't understand that.

X Q. 29. [Question repeated by the stenographer as follows: And can you tell us what it was arrived at for?]

A. We have to appraise the value of merchandise in order to find the amount assessed—to be assessed, and the penalty for a false manifest is the appraised value of the merchandise found——

X Q. 30. And did you appraise that?

A. Yes, sir.

X Q. 31. What basis did you use for appraising that?

A. I appraised it all at the foreign market value, as near as I could get it, by the number of cases aboard, and added to it the custom duties and internal revenue.

X Q. 32. You don't know what the cargo consisted of, do you?

A. Yes.

X Q. 33. You do?

A. Yes.

X Q. 34. Every kind of liquor that was on it?

A. Yes, sir.

X Q. 35. All right; what were they?

A. Two hundred and forty-three sacks William Penn American Rye Whiskey containing 24 16-ounce bottles to the sack; that figures 729 gallons at $18 a case foreign value, shows a foreign value of $4,374 for that lot. Add to that the duty of $6.10, including the customs duty and internal revenue on 729 gallons, brings the total to a domestic value on that lot to $8,820.90.

X Q. 36. Just a minute; in other words you are putting a duty on contraband?

A. Yes, sir.

X Q. 37. All right; go ahead.

A. One hundred and six sacks William Penn American Rye Whiskey, twelve 32-ounce bottles to a sack, equals 318

gallons at $18 a case, brings the foreign value to $1,908; at $6.10 duties and internal revenue on 318 gallons makes that amount $3,847.80.

X Q. 38. Yes?

A. The next lot——

X Q. 39. Just a minute; now that is a duty for importa-
[fol. 49] tion of foreign merchandise at $6.10 a gallon?

A. That would be the duty on it if it was brought in for other than beverage purposes.

X Q. 40. How do you know that is foreign merchandise?

A. Well, we have seen a good deal of it from foreign countries; we know it by having seen it before.

X Q. 41. What basis have you, or what basis has the collector, if you know, for assessing any penalties for a falsity on a manifest?

A. [No answer.]

X Q. 42. According to what law? American law?

A. The Tariff Act, 1930; I haven't the exact section.

X Q. 43. Are you familiar with the manifest that is necessary for a ship sailing from St. Pierre to Nassau or the high seas?

A. No.

X Q. 44. Can you tell us what the boundaries of this collection district are?

A. Fortunately.

X Q. 45. All right; what are they?

A. The whole State of Rhode Island and three miles off shore.

X Q. 46. The whole State of Rhode Island and three miles off shore?

A. Yes.

X Q. 46a. That is all. Oh, can you tell us what collection district number 4 is—Massachusetts, isn't it? Is Massachusetts number 4 or 5?

A. Massachusetts is number 4.

X Q. 47. Can you tell us what the collection limits of that district are?

A. I am not so sure, but I think it is the whole State of Massachusetts and the coast line.

X Q. 48. And the coast line?

A. Yes.

Redirect examination.

By Mr. Boss:

Q. 49. Do you know, Mr. Hull, whether the customs collection district includes the margin of water to a distance of four leagues from the coast?

A. I think, or I understand, that a vessel bound to the United States with a cargo, with intent to unlay, is within the jurisdiction within four leagues—with intent to unlade.

The Court: I am afraid some of these questions on both [fol. 50] sides are rather unfair. After all, I shall have to say what the collection duty boundary is.

Mr. Boss: I think, perhaps, I ought to have these marked for identification, especially as we are going to have a recess.

The Court: Have you any objection to those being introduced?

Mr. Fitzpatrick: In evidence?

The Court: Yes.

Mr. Fitzpatrick: Yes, sir.

Mr. Boss: I ask that bottle, labeled "23,161", and contents be marked for identification.

The Court: Both of those were in the custody of your men?

Mr. Boss: Yes, and bottle marked "23,162" and contents be marked for identification.

The Clerk: Marked "United States 7" and "8".

Mr. Boss: Both bottles having been identified by Mr. Hull in his testimony.

The Court: I think we will recess now until two o'clock.

[Noon recess.]

HAROLD E. MCCURE (Sworn)

By Mr. Boss:

Q. 1. What is your position, Mr. McClure?

A. I am assistant chemist in the Industrial Alcohol Division.

Q. 2. Did you receive from the—did your office receive from the Deputy Collector, Hull, certain samples—bottled samples of liquid?

A. Yes, sir, we received two bottles.

Q. 3. I show you bottle labeled—label number 23,161, being United States Exhibit number 7 for identification; did you receive that sample from him? A. This sample was received from the laboratory office.

Q. 4. And did you analyze it and make a chemical analysis of the contents?

A. Yes, sir.

Q. 5. When you received it was it—were the seals unbroken?

A. Yes, sir, the original company seals were unbroken.

[fol. 51] Q. 6. And referring to this particular sample——

Mr. Fitzpatrick: I will admit all of that.

Q. 7. What was the alcoholic volume of this sample?

A. The alcoholic volume was 43.75 percent.

Q. 8. And what was it?

A. It was a distilled spirit, artificially colored, Scotch whiskey flavor.

Q. 9. Now, referring to the sample number 23,162, United States Exhibit 8 for identification, what was the alcoholic volume in the contents of that?

A. This sample was 50.65 alcohol by volume.

Q. 10. And what did it prove to be?

A. It was distilled spirits—whiskey.

Defense

FRANK D. COOK (Sworn)

By Mr. Fitzpatrick:

Q. 1. What is your full name?

A. Frank Donald Cook.

Q. 2. And where do you live, Mr. Cook?

A. Lunenberg, Nova Scotia.

Q. 3. And how old are you?

A. Thirty.

Q. 4. On November 1, 1930, what was your business?

A. Seaman.

Q. 5. An- on what boat?

A. The Mazel Tov.

Q. 6. And what were your duties on the Mazel Tov?

A. Master.

Q. 7. And how long had you been master of the Mazel Tov?

A. About three months.

Q. 8. And for whom did you work?

A. The Mazel Tov Shipping Company.

Q. 9. And how long have you followed the sea?

A. About fifteen or sixteen years.

Q. 10. Have you been master of any other boat besides the Mazel Tov?

A. Yes.

[fol. 52] Q. 11. How long have you been master of boats?

A. I was master on the schooner Nebraska for five years.

Q. 12. What schooner?

A. Nebraska.

Q. 13. The Nebraska. Now, how many members of the crew was there on the Mazel Tov November 1, 1930?

A. Eight besides myself.

Q. 14. Eight besides yourself. You are familiar with charts?

A. Yes.

Q. 15. You can find your location?

A. Yes.

Q. 16.Who was the mate on the Mazel Tov?

A. Augustus Richards.

Q. 17. Augustus Richards. On the evening of November 1st at approximately 6 o'clock will you find your position and give it in latitude and longitude—you can open it all out?

A. Approximately?

Q. 18. Approximately. What does your letter show?

A. There are so many marks here it is all mixed up. I had a mark and I lost it.

Q. 19. Is it around in here?

A. Latitude 41.06.30 north, longitude 70.34.30.

Q. 20. Now, did you take any soundings?

A. I did.

Q. 21. That night?

A. Yes.

Q. 22. When did you take soundings?

A. When the coast guard was alongside of us, and before that.

Q. 23. While the coast guard was alongside of you what did your soundings show?

A. Twenty-one and a half fathoms.

Q. 24. Twenty-one and a half fathoms; did you have any conversation with any coast guard man relative to soundings?

A. I did.

Q. 25. What did they say relative to soundings—who was it?

A. Lieutenant Lawson, I believe.

Q. 26. What was that?

A. He said they had 20 fathoms of water and I said we had more than that.

Q. 27. Who said——

A. They said they had 20 fathoms and I said we had more than that.

[fol. 53] Q. 28. How much more did you have?

A. Twenty-one and a half.

Q. 29. At six o'clock, or shortly before six, on the night of November 1st, were you under way?

A. Yes.

Q. 30. Had you been anchored at any time between five and six?

A. No.

Q. 31. Whether or not, at the time the coast guard vessel came alongside and before, you had lights on your vessel?

A. Yes.

Q. 32. What lights did you have on?

A. The usual running lights.

Q. 33. And the coast guard vessel had no lights?

A. No.

Q. 34. Now, tell the court, please, what the conversation was when the coast guard vessel came along beside you.

A. He told me to heave to and stop and we did so, and then I asked him what he wanted and he said he thought we were inside the twelve-mile limit and was going to tow us in to New London.

Q. 35. Yes?

A. He said he was going to stop and look up his position and find his position and if he thought we were inside the

limits he was going to tow us to New London for examination, since we had contraband cargo, of course.

Q. 36. What did you say?

A. I said we were outside the twelve-mile limit.

Q. 37. Now, Lieutenant Commander Sexton, did he say anything to you relative to the distance off shore?

A. I asked him where he thought we were and he said eleven and a half miles from No Man's Land.

Q. 38. You asked him where he thought you were and he said eleven and a half miles from No Man's Land—and from the position that you were in when the coast guard boat was alongside, was it possible from the bridge of your boat to take a bearing on Gay Head light?

A. Not from our boat, because we couldn't see Gay Head light.

[fol. 54] Q. 39. You couldn't see Gay Head light. Whether or not you tried to take a bearing on Gay Head?

A. What is that?

Q. 40. Did you try to get a bearing on Gay Head?

A. I did, I looked for it; I sent some of the men up to see if they could see it to take a bearing.

Q. 41. How long was it after the search light was first put on the Mazel Tov before she hailed you—the Tucker?

A. Oh, perhaps a couple of minutes, I don't know exactly.

Q. 42. A couple of minutes, and when did you first know it was a coast guard boat definitely?

A. When he told me.

Q. 43. When he was alongside?

A. Yes.

Q. 44. Before this boat came alongside, was there anything distinguishing about it to inform you that it was a coast guard boat, by the lights or flag or anything like that?

A. I didn't see any lights except the search light when she came near us. The search light.

Q. 45. Now, after the officer came on board you showed him the manifest?

A. I did.

Q. 46. And showed him where your cargo was?

A. I did.

Q. 47. And when the coast guard boat got up to you, or before the coast guard boat got up to you, were you headed or bound for the United States?

A. No.

Q. 48. Which way were you sailing?

A. Heading west by south.

Q. 49. Heading west by south, when the coast guard boat came along?

A. When I first saw the coast guard.

Q. 50. When you first saw the coast guard, and you had a cargo of liquor aboard that vessel?

A. Yes.

Q. 51. What did you intend to do with it?

A. Intended to get rid of it.

Q. 52. Well, how?

A. Sell it.

Q. 53. To whom?

A. Anybody.

Q. 54. Anybody that would pay the price?

A. Yes.

Q. 55. Where did you intend to sell it?

A. On the high seas.

[fol. 55] Q. 56. Whether or not at any time on November 1st any form of contact boat, as they are commonly called, made contact with your vessel?

A. No.

Q. 57. At any time on November 1st, or any time before that, Mr. Cook, did your vessel, the Mazel Tov, enter any collection district of the United States?

A. No.

Q. 58. How far from the point you allege you were at the time of the seizure was it to No Man's?

A. At the time of seizure—that is, when they came up alongside?

Q. 59. Yes.

A. Thirteen and three-quarters miles, I think it is.

Q. 60. Thirteen and three-quarters miles, and upon what do you base that figure?

A. I determined that position by the—what the log showed us when we were towing into No Man's buoy.

Q. 61. The first time your vessel was ever in the territorial or maritime waters of the United States was when your vessel, the Mazel Tov, was towed in by the coast guard; is that correct?

Mr. Boss: I object to the form of the question.

The Court: Sustained. That calls for a conclusion.

Q. 62. When was the first time your vessel entered the territorial waters of the United States?

Mr. Boss: It doesn't show he knows when he was in territorial waters.

Mr. Fitzpatrick: I think he knows about it.

The Court: Do we need any more than to find out where he was? I don't know of any law that shows the territorial waters of the United States beyond three miles.

Q. 63. At any time, captain, was the Mazel Tov within one hour sailing distance of the coast of the United States?

A. No.

Q. 64. With the cargo such as was on board the Mazel Tov at the time of seizure and under the conditions as existed at that time, six or thereabouts P.M., November 1, 1930, what [fol. 56] would be the speed of your—or what distance would the Mazel Tov cover in one hour sailing time?

A. Between nine and ten miles.

Q. 65. Between nine and ten miles. Do you know what your ship's papers show the speed of the Mazel Tov to be?

A. Nine miles, I believe.

Q. 66. Did that boat—or could that boat, the Mazel Tov, under the most favorable conditions make a speed of twelve miles an hour?

A. No.

Q. 67. Would the Mazel Tov make more speed loaded or light?

A. Make more light.

Q. 68. It would make more light, so that on this night of November 1st you would say that the speed of your boat would be between nine and ten miles per hour; is that correct?

A. Yes. I should say so.

Q. 69. Did you at any time unload any of your cargo any place within twelve miles or one hour sailing time of your vessel from the coast of the United States?

A. No.

Q. 70. Did you enter any port of entry in the United States?

A. No.

Q. 71. The seizure was made on November 1st; is that correct?

A. Yes.

Q. 72. And were you arrested?

A. I suppose so, along with the rest.

Q. 73. And your crew.

A. Yes.

Q. 74. And were you brought before an officer of the United States in this building?

A. No.

Q. 75. No, not that day, November 1st, but any time?

A. Yes.

Q. 76. When?

A. November 3d. * * *

Q. 78. While you were under the custody of the coast guard were you questioned by coast guard men and customs men?

A. Yes.

Q. 79. And do you know whether or not any other members of your crew were?

A. Yes, some of them were.

[fol. 57] Q. 80. Some of them were. On the following Monday, on November 3d, you were brought into this building?

A. Yes.

Q. 81. Alone?

A. No; with the whole crew.

Q. 82. The whole crew, and at that time you were charged with conspiracy to import four hundred cases of intoxicating liquor, more or less; is that correct?

A. Yes.

Q. 83. And you entered a plea?

A. Yes.

Q. 84. Of what?

A. Not guilty.

Q. 85. And were released on bond?

A. Yes.

Q. 86. And the cases against you and your crew were finally dismissed; is that correct?

A. Yes.

Q. 87. When did you throw over the log line?

A. At the time we started to tow towards land; I don't know the exact hour.

Q. 88. But at the exact time that they started to tow you?

A. Yes.

Mr. Fitzpatrick: You may inquire.

Cross-examination.

By Mr. Boss:

X Q. 89. You signed as master July 24, 1930?

A. Yes.

X Q. 90. Of the Mazel Tov. You cleared from St. Pierre October 16, 1930?

A. Yes.

X Q. 91. And what cargo did you have on board then?

A. A cargo of liquor.

X Q. 92. How many cases?

A. There was about four hundred cases.

X Q. 93. What is your capacity?

A. The capacity is about fifteen or sixteen hundred.

X Q. 94. And where did you get your cargo?

A. At St. Pierre.

[No cross-question numbered 95.]

X Q. 96. How long were you shipping at your home port?

A. I don't remember exactly how long—a few hours. I don't know exactly the time.

X Q. 97. And you cleared from St. Pierre on this voyage [fol. 58] with only about a quarter of your capacity as a cargo; is that correct?

A. Yes.

X Q. 98. Are you sure about that?

A. Yes.

X Q. 99. Only about a quarter of your cargo?

A. About that.

X Q. 100. Well, how many cases did you have?

A. About four hundred cases.

X Q. 101. And there were four hundred cases on board when you were seized?

A. About that.

X Q. 102. Yes. When did you arrive off the coast of Massachusetts? * * *

X Q. 103. When did you arrive off the coast of Massachusetts?

A. I don't know the exact date.

X Q. 104. Give it to me as near as you can recollect.

A. Perhaps the 22d or 23d; I don't remember the exact date.

X Q. 105. Of October?

A. Yes.

X Q. 106. And what did you do between that date and November 1st?

A. We cruised around and stopped sometimes.

X Q. 107. The destination given in your manifest is Nassau and the high seas?

A. Yes, sir.

X Q. 108. And you and the men were shipped to go to Nassau and the high seas and other points in Canada and in the United States, were you not? * * *

A. I shipped to go to Nassau and the high seas.

X Q. 111. Did you know your shipping articles provided that you might go to the United States?

A. I did not.

X Q. 112. You did not. Didn't you read them before you signed them?

A. I had them read to me; I don't remember that part.

X Q. 113. I show you United States Exhibit number 3; is that your signature on that first page?

A. I suppose it is.

X Q. 114. Well, don't you know?

A. It is.

X Q. 115. It is. Will you read the writing here which states what voyage you shipped for?

[fol. 59] Mr. Fitzpatrick. I object.

X Q. 116. —and see whether that includes the United States.

The Court: Objection overruled.

X Q. 117. You did ship for the United States as well as for other ports or points?

A. I didn't ship with the intention of going to the United States.

X Q. 118. But you knew that you might be required to go there?

A. I did not.

X Q. 119. I show you United States Exhibit number 1; is that the manifest that you produced for the boarding officers?

A. Yes.

X Q. 120. And did you have any schedule or list on board the Mazel Tov showing of what your cargo consisted?

A. I did not.

X Q. 121. Were the hatches filled?

—. ——.

X Q. 122. Were they filled?

A. No.

X Q. 123. You did not make sail or did not steer for Nassau, did you? * * *

A. I steered in the general direction of Nassau.

X Q. 126. But you weren't going to Nassau, were you?

A. Not directly.

X Q. 127. Were you going there after your boat had been emptied?

A. Perhaps so.

X Q. 128. Didn't you have any orders as to where you would go when your boat was emptied? * * *

A. I had no orders.

X Q. 130. How many prior voyages had you made in the Mazel Tov since July 1930 when you shipped as master?

A. I guess two. * * *

X Q. 132. You had been trailed by the United States destroyers a few days prior to November 1st.

A. Yes.

X Q. 133. You were trailed by the Jewett on October 30th?

A. I don't remember the name or the exact date. I am not positive.

[fol. 60] X Q. 134. The Wainwright on October 29th?

A. Perhaps so; I don't remember.

X Q. 135. The Cummings on October 21st?

A. I don't remember—maybe.

X Q. 136. The Shaw on October 21st?

A. I don't know. * * *

X Q. 137. How about the Shaw?

A. I don't remember.

The Court: What difference does it make? Isn't it assumed, when you get out in the open, that destroyers have a right to cruise and other boats too.

X Q. 138. Do you deny, Captain Cook, that any of your cargo was taken off of your boat while you were off the Coast of Massachusetts by contact boats?

A. I do.

X Q. 139. So that you hovered off the coast of Massachusetts from about October 22d to November 1st without disposing of any of your cargo?

Mr. Fitzpatrick: Just a minute. I object to the question.

Mr. Boss: I am testing his story.

The Court: Are you afraid of a special meaning of the word "hover"?

Mr. Fitzpatrick: Yes, that is just what I am afraid of.

The Court: Sustained.

X Q. 140. Did your vessel remain off the coast of Massachusetts from October 22d to November 1st without having any of the cargo taken off?

A. Yes.

X Q. 141. You said you were going to sell your cargo to anybody who wanted to buy it?

A. Yes.

X Q. 142. British or American boats?

A. I didn't ask them their nationality.

X Q. 143. You would sell it to anybody?

A. I didn't care who he is.

X Q. 144. How did you place your position at the time that you were observed by the Tucker—how did you place it?

A. By dead reckoning and observation of the sun in the afternoon and by soundings.

[No cross-question numbered 145.]

[fol. 61] X Q. 146. Have you the piece of paper you used when you put the calipers on the chart?

A. I believe I have. I was going to say, also, by the distance that we were towed in to the No Man's buoy.

X Q. 147. Now the writing on this paper was on here before you came in the court room, wasn't it?

A. Some of it was; I might have marked some on since. * * *

X Q. 149 The figures showing latitude and longitude were on this paper when you came into this courtroom?

A. All except those there.

X Q. 150. The figures "Latitude 41 degrees 5 minutes 15 seconds, and longitude 70 degrees, 34 minutes, 30 seconds" were on that paper when you came in the courtroom?

A. They were.

X Q. 151. Did you state to Commander Sexton—

A. I didn't understand that.

X Q. 152. Did you state to Commander Sexton that you would like to wait until morning to fix your position?

A. Not to fix my position; to prove my position.

X Q. 153. To prove your position, you wanted to wait until morning?

A. Yes.

X Q. 154. Do you know John J. Kahler—do you know who he is?

A. No.

X Q. 155. Do you recognize that man as having seen him before [indicating]?

A. Yes; he looks familiar.

X Q. 156. And were you questioned in his presence on November 3d?

A. Yes.

X Q. 157. And do you know that he took down what you said—do you know that he wrote down what you said?

A. I believe so.

X. Q. 158. And did you say in his presence that the speed of your boat was eleven miles, but ten on the average?

—. ——.

X Q. 159. Did you?

A. I don't recall as I said exactly that; perhaps I did.

[fol. 62] X Q. 160. That is correct, isn't it?

A. What is correct?

X Q. 161. That the speed of the Mazel Tov was eleven miles, but ten on the average?

A. Perhaps the maximum speed may be eleven miles under favorable conditions.

X Q. 162. But you made that statement at that time, didn't you?

A. Perhaps I did; I don't remember exactly.

X Q. 163. You won't deny that you did?

A. I don't like to deny point blank what I said because I might have said it.

Mr. Boss: That is all.

Redirect examination.

By Mr. Fitzpatrick:

Q. 164. You are charged with the violation of certain tariff acts of the United States tariff, and certain penalties have

been assessed against you for a violation that took place in latitude 41 degrees, 68 minutes, 45 seconds north, and longitude 70 degrees, 36 minutes and 30 seconds west. Is there any such place as latitude 41 degrees, 68 minutes and 45 seconds?

A. No.

Q. 165. Any such thing as 68 minutes?

A. No.

Q. 166. The most is 60 on a chart, isn't it?

A. Yes.

Q. 167. Or on a clock, either?

—. —.

This is to certify that the foregoing is a true copy, according to my notes.

Emma M. Cummings, Court Stenographer.

IN UNITED STATES DISTRICT COURT

STIPULATION AS TO EXHIBITS

It is stipulated that United States Exhibits Nos. 1 to 6, inclusive, shall be treated as original exhibits and shall be sent up to the Circuit Court of Appeals for the First Circuit in their original form.

George R. Beane, Joseph E. Fitzpatrick, Proctor for the Claimant, by Mortimer W. Newton.

[fol. 63] IN UNITED STATES DISTRICT COURT

MOTION TO RELEASE ON BOND—Filed in Admiralty 1646, January 7, 1931

Now comes the claimant in the above-entitled cause and moves that the British Motor Screw Mazel Tov, her engines, tackle, apparel and furniture be released on bond.

Frank Cook, by His Attorney, Joseph E. Fitzpatrick.

IN UNITED STATES DISTRICT COURT

AFFIDAVIT IN SUPPORT OF MOTION TO RELEASE ON BOND—Filed January 7, 1931

I, Frank Cook, of Lunenburg, Nova Scotia, on oath depose and say that I am the master, claimant and bailee of the British Motor Screw Mazel Tov, against which libel has been brought by the United States of America, and said vessel is now in the custody of the Collector of Customs.

Frank Cook.

Before me, at Providence, in the County of Providence and State of Rhode Island, this fifth day of January, A. D. 1931, personally appeared Frank Cook, known to me and known by me to be the party signing this affidavit, and he made oath that the statements contained herein are true as of his own knowledge, and statements on information are true to the best of his knowledge and belief.

Joseph E. Fitzpatrick, Notary Public.

IN UNITED STATES DISTRICT COURT

APPRAISAL

Thereafter, on the tenth day of January, three appraisers were appointed by the court, and were duly sworn to appraise the vessel Mazel Tov and her appurtenances, and on the nineteenth day of January, 1931, the report of said appraisers was returned and filed, in the sum of $14,700.

[fol. 64] IN UNITED STATES DISTRICT COURT

OPINION—Filed May 16, 1931

LETTS, J.:

This is a libel in rem brought by the United States against the British Motor Vessel Mazel Tov, after it had been seized and brought into port by officers of the coast guard, to effect the collection of certain penalties claimed to have

been assessed against the master for alleged violations of the Tariff Act of 1930. The libel states three causes for penalty: (1) for failure to produce the manifest of the cargo; (2) for having on board merchandise not described in the manifest and (3) for having arrived within the limits of collection district No. 4 and attempting to depart without making entry. The first two causes are laid as violations of Section 584 and the third as a violation of Section 585. No forfeiture of either cargo or vessel is asked.

I shall not here review the testimony of the various witnesses, but will state the facts as I find them to be. On the evening of November 1, 1930, the Mazel Tov was boarded by officers of the United States destroyer Tucker off the coast of Massachusetts eleven and one-half miles from the nearest point of land. The vessel at the time was under way, but promptly stopped when signaled so to do. Her sole cargo, outside of sea stores, consisted of 403 sacks of whiskey which had been cleared at St. Pierre on October 16. While the cargo was little more than one-fourth the quantity which the vessel could carry, there was no evidence that the Mazel Tov had either been in communication with our shores or had unladen any part of her cargo. The circumstances compel the conclusion that the vessel was cruising about off our coast with the intent on the part of the master [fol. 65] that ultimately the cargo would be taken to the United States by other boats. The evidence indicates that the master of the Mazel Tov did not intend to approach nearer than four leagues to our coast. The point of land from which the Mazel Tov is here found to have been eleven and one-half miles distant is a small island, "No Man's Land", lying some distance at sea off the island of Martha's Vineyard.

The speed of the Mazel Tov, under normal conditions, was not in excess of ten knots. Her certificate of registration gives the speed as nine knots, which is not inconsistent with the size of the vessel and motors with which it is equipped. The master testified the boat could do between nine and ten knots. No evidence was presented by the Government which would suggest that these speeds were not substantially correct.

Upon request of the boarding officer, the Mazel Tov's papers were produced, consisting of her certificate of Brit-

ish registry, manifest, clearance papers and crew list. The manifest, which was written in French, shows the port of departure to have been St. Pierre and gives the destination of the vessel as "Nassau et al haute mer." The cargo and consignee appear as follows:

"1 lot de diverses merchandises lest et provisions de bord.

Saint Pierre le 16 Octobre 1930.

Le Capitaine, F. D. Cook."

Following the inspection by the boarding crew, the Mazel Tov was taken in tow by the coast guard at a point thirteen miles from land, having drifted a considerable distance during the period of inspection. She was brought to the port of Providence and there turned over to the customs officials, together with her cargo. The cargo was appraised by the customs officials and the following notification to the master given:

[fol. 66] "November 18, 1930.

Frank Cook, master of British motorship Mazel Tov, c/o Joseph E. Fitzpatrick, attorney, 317 Hospital Trust Bldg., Providence, R. I.

SIR: You are hereby notified that the above-named vessel has become liable to penalties for violations of Acts of Congress as follows:

Tariff Act of 1930, Sec. 584, Falsity of Manifest, $14,286.18.

Tariff Act of 1930, Sec. 584, Lack of Manifest, $500.

Tariff Act of 1930, Sec. 585, Attempting to Depart Before Report or Entry, $5,000.

These violations occurred November 1, 1930, at, to wit, 6.05 p. m. in latitude 41° 68′* 45″ N and longitude 70° 36′ 30″ W, within a collection district of the United States, said vessel having thereafter been arrested by Customs and Coast Guard officers and brought to the Port of Providence.

Respectfully, Emery J. San Souci, Collector."

No other action was taken by the Government prior to filing this libel.

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*Error in notice.

At the outset there is one question which underlies all three causes stated in the libel. The Mazel Tov, loaded with liquor ultimately intended for transshipment to the United States, was seized at a point less than four leagues from our coast, but at a greater distance than she could have traversed in one hour. Was this seizure lawful? The answer to this question is dependent upon the relation to, and effect upon, the search and seizure provisions of the Tariff Act, of the treaty entered into between the United States and Great Britain, proclaimed May 22, 1924. (43 Stat. 1761.)

The preamble of the treaty recites that the two nations [fol. 67] "being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of alcoholic beverages, have decided to conclude a Convention", etc. The preamble also recites that the purpose of the convention is "to aid in the prevention of the smuggling of intoxicating liquors into the United States".

Article I asserts the intention of the parties "to uphold the principle that three marine miles * * * constitute the proper limits of territorial waters". Paragraph (1) of Article II provides for boarding and examining vessels of British registry. Paragraph (3) of Article II provides: "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense." The remaining provisions of the treaty are not here necessary to be stated.

It was clearly indicated by the court in the case of Ford et al. v. United States, 273 U. S. 593, in an opinion written by Mr. Chief Justice Taft that this treaty had relation to all the laws in effect in the United States having to do with prohibiting and forestalling the importation of intoxicating liquor. In that case the court said at page 618:

"The parties were dealing with a situation well understood by both. In effect they wished to enable the United States better to police its seaboard by enabling it, *within an hour's sail* from its coast, beyond its territorial jurisdiction and on the high seas, to seize British actual or would-be smugglers of liquor and, if they were caught, to proceed

criminally against them as if seized within the three-mile limit for the same offenses, in reference to liquor importation. No particular laws by title or date were referred to in the treaty but only the purpose and effect of them."

[fol. 68] The court referred specifically to both the National Prohibition and Tariff legislation and on page 619 says:

"Any law, the enforcement of and punishment under which will specifically prevent smuggling of liquor, should be regarded as embraced by the treaty."

There appears to be entertained three distinct interpretations of the effect of this treaty.

First. That the treaty extends the right of search and seizure so that a vessel with a speed greater than twelve knots can be seized within the distance of one hour's sail even though that be more than four leagues from our coast. Those entertaining this view, when confronted with the query upon what legislative authority can a vessel be seized beyond four leagues from our coast, which is the maximum distance fixed in any provision of the Tariff Act (there being no right of pursuit involved), resort to the doctrine that "the treaties are self-executing and extend the laws of the United States."* They entirely ignore the fact that the treaty purports to forbid nothing but only indicates that "His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels", etc. and that, if certain conditions exist, "the vessel may be seized and taken into a port of the United States, * * * for adjudication in accordance with such laws", clearly referring to acts of Congress.

Second. Others seem to recognize that there is nothing in the treaty which extends the application of any act of

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*This notion may have been introduced by some courts because of the currency which has been given to an excerpt from a communication by Secretary Hughes, March 3, 1924, addressed to the House Committee on Foreign Affairs, in which he said: "The proposed treaty is, in a strict sense, self-executing, requiring no legislation on the part of Congress to make it effective."

Congress but are unwilling to accept the conclusion that the effect of the treaty may in many instances, where the vessel involved could not traverse in one hour a distance of four [fol. 69] leagues, result in limiting the exercise of the right of search and seizure asserted by Congress. As was said by the court in the case of The Vinces, 20 Fed. (2d) 164, at page 174:

"It is inconceivable that the parties could have intended to abrogate any such rights already existing without an explicit statement to that effect. I am clearly of opinion that the British treaty is not exclusive, and did not abrogate the statute of the United States providing for search and seizure within the twelve-mile limit."

Those entertaining this view appear to assume that prior to the negotiation of the treaty there was an unquestioned right to search and seize within the limits fixed by the statute. Perhaps that was so from the point of view of domestic law. It clearly was not so from the point of view of our international relations with Great Britain and many other countries. The purpose of the treaty was to avoid and to set at rest any international complications arising from an assertion of extraterritorial jurisdiction by Congress which was not recognized by other nations. Both the United States and Great Britain had long been the champions of limiting general territorial jurisdiction to the three-mile limit and had left all assertions of authority beyond that limit, in instances where protecting or police measures were necessary, to be dealt with as specific problems rather more administrative than jurisdictional in character.

The third view as to the effect of this treaty, and the one which I believe is supported by the majority of present authorities and by the soundest reasoning, is that it dealt completely with the subject of the limits within which search and seizure of British vessels could be made in the enforcement and application of our laws for the prevention of the importation or smuggling of liquor, and that the treaty excludes all extra-territorial seizures (that is be- [fol. 70] yond the three-mile limit), not made in conformity with the terms of the treaty. That such was the intention of the parties is apparent from the statement made by Sec-

retary Hughes, who negotiated the treaty with the British Government, in his note of July 19, 1923, to the British Embassy wherein he said:

"It may confidently be asserted that there would be no disposition on the part of the American authorities, and the special agreement would not justify any attempt, to seize a British vessel, save within the limits proposed, and when it was clear that the vessel concerned was directly involved in an attempt to introduce its illicit cargo into the territory of the United States."—MS. records, Department of State.

It is a matter of common knowledge that prior to entering into the treaty agreement the British Government had on several occasions protested against the seizure of boats of British registry outside the three-mile limit which carried cargoes of liquor. This situation existed at the time the treaty was negotiated and the convention entered into. The treaty says:

"The rights conferred by this article shall not be exercised at a greater distance from the coast of the United tates * * * than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense."

Can it be seriously urged that after entering into this treaty there remained in all cases the same maximum authority which had before been asserted and which was the cause of the differences to be settled?

In one of the early cases dealing with this question, the Frances Louise, 1 Fed. (2d) 1004, Morton, J., upon this point, said at page 1005:

"I have great doubt whether any such broad right of [fol. 71] seizure exists as the government contends. But it is not necessary to decide this question, because I am clearly of opinion that the whole situation is covered by the treaty. The circumstances surrounding the execution of that treaty are matters of general knowledge. Vessels of British registry were lying off our coasts, delivering liquor to small boats, which smuggled it ashore. Seizures of such vessels were made by our officials, which were regarded by the British government as unjustified by international law, and led to representations by the British government to

this country. On the other hand, British ships found themselves much embarrassed by the decision of the Supreme Court in Cunard S. S. Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306, concerning supplies of liquor which they customarily carried for use on board. Under these circumstances the treaty was negotiated. It dealt explicitly with the case of liquor ships hovering on our coast and being visited by small boats from shore. Of course, such small boats only come to the hovering vessel to get contraband goods. Both parties understood that. The plain inference is that such trading does not render the hovering vessel amenable to seizure as long as she keeps to the high seas, except as provided in the treaty. I think both nations intended the treaty to deal with the matter in a complete way. If so, upon familiar principles of law, it is conclusive."

In the case of The Sagatind, 4 Fed. (2d) 928 at page 930, Hand, J., says, in referring to a similar treaty entered into between the United States and Norway:

"The foregoing treaty extends any limitation which might exist upon the jurisdiction of the court to proceed against offending vessels which may be subject to forfeiture for violations of our laws 'prohibiting the impor- [fol. 72] tation of alcoholic beverages' to such cases as may come within the terms of the treaty, and, I think, also implies as an alternative rule of treaty-made law that vessels shall not be proceeded against for violation of such laws when seizure was made beyond the distance from our coast prescribed in the treaty. In other words, the treaty completely deals with the extreme right of seizure upon which initial jurisdiction of the cause of forfeiture must depend."

This construction as to the effect of the treaty obviously amounts to a limitation upon, and no extension of, the statutes affected. No statute dealing with this question asserts a jurisdiction or imposes any penalty beyond the distance of four leagues. The application of the treaty, therefore, in respect to all vessels of less than twelve knots results in a qualification or limitation of the statute involved by narrowing the zone over which it may be ap-

plied to that distance only which the vessel can traverse in one hour. It is, of course, an elementary principle that a treaty may have that effect upon an existing act of Congress. The rule as generally stated is that wherever there be an inconsistency between an Act of Congress and a treaty, the one most recent in point of time must control.

Ribas y Hijo v. United States, 194 U. S. 315.
Rainey v. United States, 232 U. S. 310.

The only difficulty in applying this long-established doctrine in the present case, to the end of construing the treaty as a limitation upon the Act of Congress, is that the treaty was negotiated in 1924 and the present action is brought under the Tariff Act of 1930. An examination, however, of the Tariff Act of 1930 discloses that the enforcement provisions thereof are substantially verbatim reenactments of like sections in the Tariff of 1922. It cannot be assumed, therefore, that Congress had any intention [fol. 73] of altering the status and effect of these treaties when it reenacted in 1930 the enforcement provisions prevailing when the British and other treaties were entered into.

The conclusions here reached, in respect to the effect of the British treaty, compel the dismissal of the libel and discharge of the vessel. In the hope, however, that the case may be reviewed on appeal, I shall deal with the other and subordinate issues raised which in general affect separate causes stated in the libel. This will insure a final disposition of the case through having its full consideration before the court for review.

The next issue to be considered is: what are the limits of a collection district? This issue arises under the third cause stated in the libel, which alleges that the Mazel Tov arrived from a foreign port within the limits of collection district number 4 and attempted to depart without making entry in violation of Section 585.

It is contended on behalf of the Government that the limits of the collection district extend four leagues from the shore. If this contention be sound the Mazel Tov was, at the time she was boarded, one-half mile within the limits of collection district number 4. If, however, as had been found, it was not the intention of her master to go within four leagues of the coast of the United States and that

his doing so was an inadvertent approach too close to the small island mentioned, there may be grave doubt as to whether the boat, though within the twelve-mile limit, had "arrived" within the meaning of the term as used in Section 585, and in this connection it will be recalled that the Mazel Tov when boarded had not been at anchor but was under way. Passing, however, the matter of the proper construction of the term "arrived" within the meaning of the Act, I am satisfied that the Mazel Tov was not within the limits of the collection district as alleged.

The present organization of the customs service was [fol. 74] fixed by executive act of the President pursuant to legislative authority as outlined in the President's message to Congress under date of March 3, 1913, with only minor changes which, by similar action, have subsequently been made. Collection district number 4, as then and now designated, is as follows:

"No. 4, Massachusetts. Ports of entry: Boston (including Cambridge, Chelsea, Medford, Everett, Quincy, and Somerville), Fall River, Gloucester, New Bedford, Plymouth, Provincetown, Salem (including Beverly, Marblehead, and Lynn), Springfield, Vineyard Haven, Worcester."

An examination of the legislation and executive action discloses a division of the territorial United States into some forty-nine customs collection districts, together with their ports of entry and district headquarters. These districts are variously designated, some by states, some inclusive of two states and some such as district number 12, port of entry: "Pittsburgh."

Nowhere in the legislation or executive acts organizing the customs service is there any suggestion of including within a district any area beyond the territorial limits of the state or other municipal designations. The State of Massachusetts is a very definite area, consisting of the land within its borders and littoral waters extending out three miles.

Dunham v. Lamphere (Mass.), 3 Gray, 268.

Although the term "collection district" has for many years been used in our customs legislation, there are few cases which directly involve the definition of the term.

They are all so recent as to be yet unreported at this writing.

Miller (Metmuzel) v. United States, Fourth Circuit, decided April 13, 1931.

United States v. The Frances T, Second Circuit.

United States v. The Deauville, Southern District of Alabama, decided April 29, 1931.

[fol. 75] All of these cases would be cited in support of the contention that the limits of a collection district extend beyond our territorial waters to four leagues from the coast.

In the case of the Frances T, the question of whether the vessel had arrived within the limits of a collection district was involved; the Circuit Court of Appeals, Second Circuit, affirming, without opinion, the holding of Coxe, J., that the vessel had entered collection district number 11. The vessel was seized about ten miles off-shore. An examination of the record of the case discloses, however, that there was evidence, and upon appeal the Government so contended, that the Frances T had been within the three-mile limit and made shore contact. There is nothing in the records of the District Court and/or Circuit Court to indicate whether these courts did or did not find that the vessel had been in territorial waters.

In the case of the Deauville the court, in holding that the limits of a collection district extend beyond territorial waters, rested the decision solely upon the authority of the Metmuzel case, supra. Judge Ervin's full discussion of the question is as follows:

"It is urged that being over three miles from shore, and nearly twelve miles, she was not within a collection district. This contention is met in Miller v. United States, Fourth Circuit, decided April 13, 1931, and not yet reported."

The only considered opinions, therefore, to be found upon the question are those in the Metmuzel case, that of Groner, J., for the Eastern District of Virginia, and that of Parker, C. J., affirming the lower court.

While I am reluctant, sitting as a court of first instance, to decline to follow the holding of a Circuit Court of Appeals, even of another Circuit, I cannot in this case do so and believe that the error of the conclusions reached upon

this question in the case of the Metmuzel can be demonstrated.

[fol. 76] At the outset, in his consideration of the question in the Metmuzel, Parker, J., says:

"Appellant contends that the collection district thus defined is limited to the territorial boundaries of the United States, which extend only to the three-mile limit at sea. We think, however, that this ignores the jurisdiction asserted under the revenue statutes to the twelve-mile limit, and that the collection district as *contemplated by the statute in question* extends to that limit."

The court there appears to ignore the fact that nowhere in the statute in question is there the slightest indication that Congress purports, by implication or otherwise, to be defining or fixing collection districts. The collection district had already, by totally disassociated legislation and executive action, been fixed and established. There is nothing to suggest that the Tariff Act of 1930, or that of 1922, undertook to alter the limits of these districts. It must be assumed that when Congress used the term in Section 585 of the Tariff Act they were using it with the meaning and with the limits which had long since been established. It is pure sophistry to try to read into the term "collection district" a meaning drawn by inference from the Tariff Act. If in 1913 in fixing the collection districts Congress had expressly asserted extraterritorial limits for those districts along our coast, it would be the duty of the courts to respect that assertion and leave the international complication for other authority to settle. But Congress did not do so, and it is not for the courts, and in the absence of express language of Congress, to now enlarge upon the meaning of the term.

Parker, J., further says:

"* * * it seems clear that the district must be held to embrace the territory within which the customs officials are given jurisdiction and required to perform their duties. How far does this territory extend?"

[fol. 77] This observation by the court involves the assumption that Congress may not in exercising certain police prerogatives over extraterritorial waters, assign

duties to customs officials beyond the limits of their collection districts. There appears no good reason in law why such duties may not be charged upon custom officials as well as upon the coast guard. In fact, the very statute under consideration indicates that Congress had in mind charging customs officials with duties and prerogatives of exactly that character.

Section 581 of the Tariff Act, containing the general provisions authorizing the boarding of vessels, provides in part:

"Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, *without as well as within their respective districts, to examine.* * * *"

See Maul v. United States, 274 U. S. 501, and concurring opinion of Brandeis and Holmes, JJ., at page 512.

The practice of nations to exercise certain protective measures beyond their territorial limits, to better protect their territory, has long been recognized by international law and comity among nations. That such assertions of authority are, however, extraterritorial,* although accepted and approved within limitations, does not alter the [fol. 78] fact that they are predicated upon necessity and mutual international tolerance.

Le Louis, 2 Dodson Adm. Rep. 210, 245.

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* "The Government of the United States has repeatedly asserted that the limits of territorial waters extend to three marine miles outward from the coastline * * * It is quite apparent that this Government is not in a position to maintain that its territorial waters extend beyond the three-mile limit and in order to avoid liability to other Governments, it is important that in the enforcement of the laws of the United States this limit should be appropriately recognized."—Secretary Hughes' address before the Council on Foreign Relations, New York, Jan. 23, 1924.

Nowhere is there legal warrant for courts to assert such a jurisdiction by implication. This is especially true of English and American courts.

At another part of his opinion Parker, J., says:

"If a ship bound for the United States may be required to produce a manifest of its cargo as soon as it comes within the twelve-mile limit or may be forfeited for transferring cargo within such limit without a permit, *there is no reason why forfeiture should not be enforced against a vessel bound for the United States which departs without making an entry as the statute requires.*"

The court in The Metmuzel begs the question by assuming requirements of the statute as to entry, and appears to overlook the fact that Congress in Section 581, authorizing boarding and search, specifically fixes the distance within four leagues of the coast of the United States, and in Section 586, forbidding unlading without permit, says: "after its arrival within four leagues", etc., but in Section 585, dealing with departure without entry, for its application fixes the distance "within the limits of any collection district". If it was intended that the latter should mean the same distance as is expressly provided in the other sections why was not the same simple statement "within four leagues" used?*

Having in mind the fact that we are here dealing with a statute penal in character, and the rule that extraterritorial jurisdiction should not be asserted by a Federal court in the absence of express congressional mandate, it [fol. 79] is my opinion that every sound principle of construction requires the definition of the "limits of any collection district" as being the limits of territorial waters, namely, one league from our coast.

The next issue to be considered is that raised by the first cause stated in the libel. It is alleged that the master became

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*"Yet in fact we do not deal differently with a statute from our way of dealing with a contract. We do not inquire what the legislation meant; we ask only what the statute means" Harvard Law Review, Vol. 12, pages 417, 419. "The Theory of Legal Interpretation." Oliver Wendell Holmes.

subject to a penalty of $500 under Section 584 for failure at the point where the vessel was boarded to produce the manifest of the cargo. This section, entitled "Falsity or lack of manifest", provides in part as follows:

"Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after having been unladen from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge or the owner of such vessel or vehicle shall be subject to a penalty of $500; * * *"

In the present case the Government's own testimony discloses that upon request the ship's papers were promptly produced, including one purporting to be a manifest, the content of which has already been stated. The Government contends, however, that the master is liable for a penalty of [fol. 80] $500 for failure to "produce the manifest" on the ground that the manifest presented, being inadequate, amounted to no manifest at all.

The Government relies upon the case of The Irene C, 41 Fed. (2d) 288. In that case the vessel was bound for the United States and was less than four leagues, but more than one league, from our coast. In regard to her manifest the court said:

"As her manifest did not comply with the basic requirements of our law (19 U. S. C. A. Sec. 241), it is for present purposes a nullity. Phile v. The Anna, 1 Dall. 198, 1 L. Ed. 98."

The citation is in point, but with its conclusion I do not agree.

The Government's contention is based upon the fact that the manifest produced by the master of the Mazel Tov eleven and one-half miles from our coast did not conform to the requirements of Title IV, Section 431, of the Act. This section provides in part as follows:

"The master of every vessel *arriving in the United States and required to make entry* shall have on board his vessel a manifest *in a form* to be prescribed by the Secretary of the Treasury and signed by such master under oath as to the truth of the statements therein contained."

To determine whether the requirements of Section 431 as to form and content of a manifest are to be read into Section 584, it becomes necessary to scrutinize the subdivisions of the statute and to consider the purpose and application of these subdivisions. Title IV of the statute entitled "Admin-trative Provisions" is in turn divided into Parts I, II, III, IV, V and VI. Each part is subdivided into numerous sections providing different and independent penalties where it is intended to penalize for their non-observance. Section [fol. 81] 431, wherein counsel for the Government finds the detailed requirements for the form of a manifest, is the first section of Part II, which is entitled, "Report, Entry, and Unlading of Vessels and Vehicles". I am convinced from a reading of the several sections of Part II that they apply only to vessels which have arrived in our territorial waters and in general come into intended application only when the vessel has arrived in port.

It is not until we come to Part V, wherein we find the several sections brought under consideration by the present libel, that we come to that portion of the Act embodying the special enforcement provisions and which includes among its several sections those which assert and authorize the special extraterritorial jurisdiction which has already been discussed.

Indicative of what I may term the intended "port application" of the provisions of Part II is the very nature of the things required to be done. For example, Section 431, fixing the form of the manifest, makes it applicable to the master of every vessel arriving in the United States and required to make entry. Section 439, closely following in Part II, provides:

"Immediately upon arrival and before entering his vessel, the master of a vessel from a foreign port or place required to make entry shall mail or deliver to the comptroller of customs for the district in which the port of entry is located, a copy of the manifest. * * *"

Surely no common sense interpretation of the meaning of the terms "arrival" and "arrived" as used in Part II, when considered in conjunction with things required to be done, could construe them as meaning the crossing of an extraterritorial line twelve miles at sea.

The purpose of the requirements and penalties of Section 584, Part V, is to facilitate a protective and general examination of the vessel and cargo at any point within [fol. 82] four leagues from our coast. It represents a part of the extraterritorial authority asserted. The section does not purport to impose a domestic control over the detail or form of the ship's papers other than that the cargo must be described, which is obviously necessary to the purpose to be served. It would, indeed, be a marked alteration of the American and English stand, in respect to extraterritorial jurisdiction, if in such a zone a vessel of foreign registry, or its master, should become subject to special penalties because the form of the manifest, beyond the necessary description of the cargo, did not conform to a regulation of a department of government as is contemplated in Section 431. Congress in the Tariff Act has wisely made no such assertion of absolute domestic regulation in detail until the vessel has "arrived" in the United States.

The case of Phile v. The Anna, 1 Dall. 197, cited by the court in The Irene C supra, is not in conflict with this interpretation. In the case of the Anna, whose inadequate manifest was involved, was not in extraterritorial waters but was in the port of Philadelphia.

My interpretation of the law is that the master of a vessel from a foreign port, if within four leagues of our coast, may be required to produce his ship's papers, specifically the manifest, which he carries. If he cannot, or does not, he becomes subject to a penalty of $500. If he produces a manifest, he has, in that regard, complied with the requirements of Section 584. If the manifest produced does not reasonably describe the cargo carried, there are drastic penalties to cover that situation.

As the remaining objections which were interposed to the libel are of specific, rather than of general, application or interest, they will not here be reviewed. I find that there was no irregularity or unfairness in the appraisal of the cargo. The form of the notice to the master, advising him that the vessel had become liable to the several penalties set [fol. 83] forth, was sufficient because of the authority under Section 594 to enforce the collection of penalties by summary proceedings against the vessel.

The Irene C, 41 Fed. (2d) 288, supra.
The Pesaquid, 11 Fed. (2d) 308.

A better practice would be, however, to notify the master, personally and directly, that he has become liable to, and that there have been assessed against him, the specific penalties for specified violations.

In arriving at the conclusions expressed in respect to the major issues involved in this case, I am alert to the importance and necessity of curbing the smuggling and importation of liquors in violation of our laws. I am convinced, however, that a vigorous adherence to sound legal principles of interpretation, leaving it to Congress to remedy any deficiencies in the law, is the only course which will stand the test of time.

A decree, dismissing the libel and discharging the vessel, may be submitted for approval and entry.

IN UNITED STATES DISTRICT COURT

FINAL DECREE IN ADMIRALTY 1646—Entered and Filed May 22, 1931

At a stated term of the District Court of the United States for the District of Rhode Island, held in the city of Providence on the fourth day of December, A. D. 1930.

Present: The Honorable Ira Lloyd Letts, District Judge.

The above-entitled cause came on to be heard upon the original libel of the United States of America, libellant, seeking to effect collection of certain penalties claimed to have been assessed against the master of the British Motor

Screw Mazel Tov for alleged violations of the Tariff Act of 1930 and upon the pleadings and proof and after argument of the proctors for the respective parties hereto and due deliberation being had thereon, it is ordered, adjudged and decreed that the prayer of the libellant to effect the collection of the aforementioned penalties against the British Motor Screw Mazel Tov is hereby dismissed, and the afore-[fol. 84] mentioned vessel ordered discharged from arrest and returned to the custody of its owners or their agent.

Entered as the decree of this court this twenty-second day of May, A. D. 1931. By Order.

Alice Peckham, Clerk.

Enter.

Ira Lloyd Letts, United States District Judge.

In United States District Court

Notice and Petition on Appeal in Admiralty 1646—Allowed and Filed May 25, 1931

The above-named libellant, United States of America, being aggrieved by the decree made and entered on the twenty-second day of May, A. D. 1931, in the above-entitled cause in respect to the dismissal of the prayer of the libellant to effect the collection of certain penalties against the British Motor Screw Mazel Tov and ordering the aforementioned vessel discharged from arrest and returned to the custody of the owners or their agent, hereby appeals from said decree to the United States Circuit Court of Appeals for the First Circuit for the reasons specified in the assignment of errors to be filed herein and prays that this appeal may be allowed, and prays for such other and further relief as may be just in the premises.

United States of America, by Its Proctor, Henry M. Boss, Jr., United States Attorney.

Dated May 25, 1931.

The foregoing claim of appeal is allowed.

Ira Lloyd Letts, United States District Judge.

[fol. 85] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS IN ADMIRALTY 1646—Allowed and Filed May 25, 1931

The above-named libellant, United States of America, files the following assignment of errors upon which it will rely upon the prosecution of the appeal in the above-entitled cause from a decree made and entered herein by this court on the twenty-second day of May, 1931:

1. The court erred in excluding certain testimony offered in behalf of the libellant.

2. The court erred in admitting in evidence certain testimony offered in behalf of the claimant.

3. The court erred in its findings of facts.

4. The court erred in its findings of law.

5. The court erred in dismissing the libel.

6. The court erred in dismissing the prayer of the libellant to effect the collection of penalties against the Mazel Tov.

7. The court erred in ordering the vessel discharged from arrest and returned to the custody of its owners or their agent.

Wherefore plaintiff prays that the decree of the District Court of the United States for the District of Rhode Island be reversed and that the said District Court be directed to enter decree for the libellant.

United States of America, by Its Proctor, Henry M. Boss, Jr., United States Attorney.

IN UNITED STATES DISTRICT COURT

FINAL DECREE IN ADMIRALTY 1647—Entered and Filed May 26, 1931

A libel having been filed in the above-entitled cause on the twenty-fourth day of November, A. D. 1930, seeking the

forfeiture of the cargo on the British Motor Screw Mazel Tov for alleged violation of Section 584, Title IV of the [fol. 86] Tariff Act of 1930, and coincident with this libel was filed one seeking penalties against the British Motor Screw Mazel Tov for the same violation which was fully heard before the Honorable Ira Lloyd Letts, District Judge, and a decree entered the twenty-second day of May, A. D. 1931 ordering the return of said vessel to its owners or their agent, it is hereby

Ordered, adjudged and decreed that the libel in the above-entitled cause to effect the forfeiture of 403 sacks and six bottles more or less of distilled spirits ex British Motor Screw Hazel Tov is hereby dismissed and the cargo ordered discharged and placed upon said British Motor Screw Mazel Tov in the custody of its owners or their agent.

Entered as the decree of this court this twenty-sixth day of May, A. D. 1931. By Order,

Alice Peckham, Clerk.

Enter..

Ira Lloyd Letts, United States District Judge.

In United States District Court

Notice and Petition on Appeal in Admiralty 1647—Entered and Filed May 25, 1931

The above-named libellant, United States of America, being aggrieved by the decree made and entered on the twenty-sixth day of May, A. D. 1931 in the above-entitled cause in respect to the dismissal of the libel of the United States of America, to effect the forfeiture of 403 sacks and six bottles, more or less, of distilled spirits ex British Motor Screw Mazel Tov, and ordering the aforementioned cargo discharged and placed upon said British Motor Screw Mazel Tov in the custody of its owners or their agents, hereby appeals from said decree to the United States Circuit Court of Appeals for the First Circuit for the reasons specified in the assignment of errors to be filed herein and prays that this appeal may be allowed, and prays for such

[fol. 87] other and further relief as may be just in the premises.

United States of America, by Its Proctor, Henry M. Boss, Jr., United States Attorney.

Dated May 25, 1931.

The foregoing claim of appeal is allowed.

Ira Lloyd Letts, United States District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS IN ADMIRALTY 1647—Allowed and Filed May 25, 1931

The above-named libellant, United States of America, files the following assignment of errors upon which it will rely upon the prosecution of the appeal in the above-entitled cause from a decree made and entered herein by this court on the twenty-sixth day of May, 1931.

1. The court erred in excluding certain testimony ofiered in behalf of the libellant.

2. The court erred in admitting in evidence certain testimony offered in behalf of the claimant.

3. The court erred in its findings of facts.

4. The court erred in its findings of law.

5. The court erred in dismissing the libel.

6. The court erred in ordering the said cargo ex British Motor Screw Mazel Tov discharged and placed upon said British Motor Screw Mazel Tov in the custody of its owners or their agents.

Wherefore plaintiff prays that the decree of the District Court of the United States for the District of Rhode Island be reversed and that the said District Court be directed to enter decree for the libellant.

United States of America, by Its Proctor, Henry M. Boss, Jr., United States Attorney.

[fol. 88] IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT OF RECORD ON APPEAL IN ADMIRALTY No. 1646—Filed June 19, 1931

Now comes the United States of America, libellant-appellant in the above-entitled cause, and moves that the time for filing the record in said cause be extended to the twenty-second day of July, A. D. 1931.

By Its Proctor, Henry M. Boss, Jr., E., United States Attorney.

Granted. I. L. Letts, J.

IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT OF RECORD ON APPEAL IN ADMIRALTY No. 1647—Filed June 19, 1931

Now comes the United States of America, libellant-appellant in the above-entitled cause, and moves that the time for filing the record in said cause be extended to the twenty-second day of July, A. D. 1931.

By Its Proctor, Henry M. Boss, Jr., E., United States Attorney.

Granted. I. L. Letts, J.

IN UNITED STATES DISTRICT COURT

STIPULATION FOR CONSOLIDATION IN ADMIRALTY No. 1646—Filed June 29, 1931

It is hereby agreed that the case of United States of America, Libellant, v. British Motor Ship Mazel Tov, Admiralty No. 1646, and the case of United States of America v. 403 Sacks and 6 Bottles More or Less of Distilled Spirits ex

British Motor Screw Mazel Tov, Admiralty No. 1647, are consolidated for purposes of appeal.

Henry M. Boss, Jr., United States Attorney, Proctor [fol. 89] for Libellant. Joseph E. Fitzpatrick, Proctor for Defendant.

Approved.

Ira Lloyd Letts, United States District Judge.

IN UNITED STATES DISTRICT COURT

STIPULATION FOR CONSOLIDATION IN ADMIRALTY NO. 1647—Filed June 29, 1931

It is hereby agreed that the case of United States of America, Libellant, v. British Motor Ship Mazel Tov, Admiralty No. 1646, and the case of United States of America v. 403 Sacks and 6 Bottles More or Less of Distilled Spirits ex British Motor Screw Mazel Tov, Admiralty No. 1647, are consolidated for purposes of appeal.

Henry M. Boss, Jr., United States Attorney, Proctor for Libellant. Joseph E. Fitzpatrick, Proctor for Defendant.

Approved.

Ira Lloyd Letts, United States District Judge.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT IN ADMIRALTY NO. 1646—Filed June 30, 1931

1. The court finds that at the time the British Motor Screw Mazel Tov was directed or signalled to stop by the United States coast guard she was at a point eleven and one-half miles from the shores of the United States.

2. The court find that the British Motor Screw Mazel Tov had at no time been within three miles of the United States nor within the limits of the United States.

3. The court finds that the British Motor Screw Mazel Tov sailed from a foreign port and that it was intended that the

liquors aboard the said British Motor Screw Mazel Tov [fol. 90] should be trans-hipped to contact boats and landed in the United States.

4. The court finds that the speed of the British Motor Screw Mazel Tov was between nine and ten knots an hour and insufficient to propel her to the shores of the United States in one hour's sailing time.

5. The court find that the master of the British Motor Ship Mazel Tov produced a manifest to the coast guard officer who demanded it.

6. The court finds that there was found on board the British Motor Screw Mazel Tov merchandise which was not included or described in any manifest, which said merchandise consisted of 403 sacks and 6 bottles of foreign intoxicating liquors of the value of $14,286.18.

7. The court finds that, subsequent to the seizure of the British Motor Screw Mazel Tov, the notice and the form thereof advising the master that the vessel had become liable to penalties of $500, $5,000 and $14,286.18 were sufficient and that said penalties remain unpaid.

Ira Lloyd Letts, J.

IN UNITED STATES DISTRICT COURT

CONCLUSIONS OF LAW IN ADMIRALTY No. 1646—Filed June 30, 1931

1. The court holds that under the provisions of Section 584 of the Tariff Act of 1930 the master of the British Motor Screw Mazel Tov did not become liable to pay a penalty of $500 for not producing a manifest to the coast guard officer who demanded it and that the paper introduced by the claimant constituted a manifest within the meaning of Section 584 of the Tariff Act.

2. The court holds that under the provisions of Section 584 of the Tariff Act of 1930 the master of the British Motor Screw Mazel Tov did not become liable to a penalty of $14,286.18 for having on board said vessel merchandise not included or described in any manifest because the seizure was made beyond the three mile limit and not in conformity

[fol. 91] with the treaty entered into between the United States and Great Britain, proclaimed May 22, 1924. (43 Stat. 1761.)

3. The court holds that the master of the British Screw Mazel Tov did not become liable to a penalty of $5,000 for departing or attempting to depart from any collection district contrary to the provisions of Section 585 of the Tariff Act of 1930 because at the time the British Motor Screw Mazel Tov was directed or signalled to stop by the United States Coast Guard she had not arrived within the limits of any collection district as a collection district is limited to the territorial waters of the United States and extends out to sea for a distance of three miles from shore.

4. The court holds that, under the provisions of Section 594 of the Tariff Act of 1930, the British Motor Screw Mazel Tov has not become subject to the penalties of $500, $5,000 and $14,286.18 assessed against her master and that said vessel shall not be held for the payment of such penalties.

Ira Lloyd Letts, J.

IN UNITED STATES DISTRICT COURT

LIBELLANT'S EXCEPTIONS IN ADMIRALTY NO. 1646—Allowed and Filed June 30, 1931

Now comes the libellant, United States of America, in the above-entitled cause after decree entered dismissing the prayer of the libellant to establish certain penalties against the British Motor Screw Mazel Tov and excepts to the findings and rulings of the court made in said case as follows:

1. To the finding of the court that at the time the British Motor Screw Mazel Tov was directed or signaled to stop by the United States coast guard she was at a point eleven and one-half miles from the shores of the United States.

2. To the finding of the court that the speed of the British Motor Screw Mazel Tov was between nine and ten knots an hour and insufficient to propel her to the shores of the United States in one hour's sailing time.

3. To the finding of the court that the master of the Brit-
[fol. 92] ish Motor Ship Mazel Tov produced a manifest to the coast guard officer who demanded it.

4. To the ruling of the court that the master of the British Motor Screw Mazel Tov did not become liable to pay a penalty of $500 for not producing a manifest to the coast guard officer who demanded it and that the paper introduced by the claimant constituted a manifest within the meaning of Section 584 of the Tariff Act.

5. To the ruling of the court that the master of the British Motor Screw Mazel Tov did not become liable to a penalty of $14,286.18 for having on board merchandise not included or described in any manifest because the seizure was not made in conformity with the treaty with Great Britain.

6. To the ruling of the court that the master of the British Motor Screw Mazel Tov did not become liable to a penalty of $5,000 for departing or attempting to depart from any collection district, because a collection district is limited to the territorial waters of the United States and extends out to sea for a distance of three miles from shore.

7. To the ruling of the court that the British Motor Screw Mazel Tov had not become subject to penalties of $500, $5,000 and $14,286.18.

8. To the order of the court ordering entry of the final decree dismissing the prayer of the libellant to effect the collection of penalties against the British Motor Screw Mazel Tov.

United States of America, by Its Attorney, Henry M. Boss, Jr. E.

Allowed. I. L. Letts, J.

[fol. 93] IN UNITED STATES DISTRICT COURT

LIBELLANT'S BILL OF EXCEPTIONS IN ADMIRALTY No. 1646—Allowed and Filed June 30, 1931

1. The exception of the libellant to the finding of the court that at the time the British Motor Screw Mazel Tov

was directed or signaled to stop by the United States coast guard she was at a point eleven and one-half miles from the shores of the United States.

2. To the finding of the court that the speed of the British Motor Screw Mazel Tov was between nine and ten knots an hour and insufficient to propel her to the shore of the United States in one hour's sailing time.

3. The exception of the libellant to the finding of the court that a manifest was produced.

4. The exception of the libellant to the ruling of the court that the master did not become liable to pay a penalty of $500.

5. The exception of the libellant to the ruling of the court that the master did not become liable to pay a penalty of $14,286.18.

6. The exception of the libellant to the ruling of the court that the master did not become liable to pay a penalty of $5,000.

7. The exception of the libellant to the ruling of the court that the seizure was not made in conformity with the treaty with Great Britain.

8. The exception of the libellant to the ruling of the court that there was no jurisdiction in the court to forfeit the Mazel Tov if found within the twelve-mile limit when the speed of the vessel was insufficient to propel her to shore in one hour's sailing time.

9. The exception of the libellant to the ruling of the court that a collection district extends three miles to sea and not twelve miles to sea.

10. The exception of the libellant to the ruling of the [fol. 94] court that the Mazel Tov did not become subject to the penalties of $500, $5,000 and $14,286.18, assessed against her master.

11. The exception of the libellant to the order of the court ordering the entry of the final decree dismissing the prayer of the libellant to effect the collection of penalties against the British Motor Screw Mazel Tov.

And the said libellant says that all of said findings and rulings were erroneous and that said errors entitle it to the entry of decree for the libellant.

Wherefore it presents this its bill of exceptions and prays that the same may be allowed according to law.

United States of America, by Its Attorney, Henry M. Boss, Jr., E., United States Attorney.

Allowed. I. L. Letts, J.

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT IN ADMIRALTY No. 1647—June 30, 1931

1. The court finds that at the time the British Motor Screw Mazel Tov was directed or signalled to stop by the United States coast guard she was at a point eleven and one-half miles from the shores of the United States.

2. The court finds that the British Motor Screw Mazel Tov had at no time been within three miles of the United States nor within the limits of the United States.

3. The court finds that the British Motor Screw Mazel Tov sailed from a foreign port and that it was intended that the liquors aboard the said British Motor screw Mazel Tov should be transshipped to contact boats and landed in the United States.

4. The court finds that the speed of the British Motor Screw Mazel Tov was between nine and ten knots an hour [fol. 95] and insufficient to propel her to the shores of the United States in one hour's sailing time.

5. The court finds that the master of the British Motor Screw Mazel Tov produced a manifest to the coast guard officer who demanded it.

6. The court finds that there was found on board the British Motor Screw Mazel Tov merchandise which was not included or described in any manifest, which said merchandise consisted of 403 sacks and six bottles of foreign intoxicating liquors of the value of $14,286.18.

Ira Lloyd Letts, J.

IN UNITED STATES DISTRICT COURT

CONCLUSION OF LAW IN ADMIRALTY No. 1647—June 30, 1931

The court holds that under the provisions of Section 584 of the Tariff Act of 1930 the cargo of the British Motor Screw Mazel Tov consisting of 403 sacks and 6 bottles of foreign intoxicating liquors is not forfeited to the United States because the seizure was made beyond the three mile limit, and beyond the distance from shore that the vessel could traverse in one hour's sailing time and was not made in conformity with the treaty entered into between Great Britain and the United States, proclaimed May 22, 1924 (43 Stat. 1761).

Ira Lloyd Letts, J.

IN UNITED STATES DISTRICT COURT

LIBELLANT'S EXCEPTIONS IN ADMIRALTY No. 1647—Allowed and Filed June 30, 1931

Now comes the libellant, United States of America, in the above-entitled cause after decree entered dismissing the prayer of the libellant to effect the forfeiture of the cargo of the British Motor Screw Mazel Tov and excepts to the findings and rulings of the court made in said case as follows:

1. To the finding of the court that at the time the British Motor Screw Mazel Tov was directed or signalled to stop by [fol. 96] the United States Coast Guard she was at a point eleven and one-half miles from the shores of the United States.

2. To the findings of the court that the speed of the British Motor Screw Mazel Tov was between nine and ten knots an hour and insufficient to propel her to the shores of the United States in one hour's sailing time.

3. To the decision of the court that under the provisions of Section 584 of the Tariff Act of 1930 the cargo of the British Motor Screw Mazel Tov consisting of 403 sacks and 6 bottles of foreign intoxicating liquors is not forfeited to the United States because the seizure was made beyond the three mile limit, and beyond the distance from shore that

the vessel could traverse in one hour's time and was not made in conformity with the treaty entered into between Great Britain and the United States proclaimed May 22, 1924 (43 Stat. 1761).

4. To the order of the court ordering the dismissal of the libel for the forfeiture of 403 sacks and 6 bottles of distilled spir-ts ex British Motor Screw Mazel Tov.

United States of America, by Its Attorney, Henry M. Boss, Jr., E.

Allowed. Ira Lloyd Letts, J.

IN UNITED STATES DISTRICT COURT

LIBELLANT'S BILL OF EXCEPTIONS IN ADMIRALTY No. 1647—Allowed and Filed June 30, 1931.

1. The exception of the libellant to the finding of the court that at the time the British Motor Screw Mazel Tov was directed or signalled to stop by the United States Coast Guard she was at a point eleven and one-half miles from the shores of the United States.

2. To the finding of the court that the speed of the British Motor Screw Mazel Tov was between nine and ten knots an [fol. 97] hour and insufficient to propel her to the shores of the United States in one hour's sailing time.

3. To the decision of the court that under the provisions of Section 584 of the Tariff Act of 1930 the cargo of the British Motor Screw Mazel Tov consisting of 403 sacks and 6 bottles of foreign intoxicating liquors is not forfeited to the United States because the seizure was made beyond the three mile limit, and beyond the distance from shore that the vessel could traverse in one hour's sailing time and was not made in conformity with the treaty entered into between Great Britain and the United States, proclaimed May 22, 1924. (43 Stat. 1761.)

4. To the order or the court ordering the dismissal of the libel for the forfeiture of 403 sacks and 6 bottles of distilled spirits ex British Motor Screw Mazel Tov.

United States of America, by Its Attorney, Henry M. Boss, Jr., E.

Allowed. Ira Lloyd Letts, J.

IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT OF RECORD ON APPEAL (ADMIRALTY NOS. 1646 AND 1647)—Entered and Filed July 9, 1931

Now comes the United States of America, libellant-appellant in the above-entitled cause, and moves that the time for filing the record in said cause be extended to the twenty-second day of August, A. D. 1931.

By Its Proctor, Henry M. Boss, Jr., United States Attorney.

Allowed.

Ira Lloyd Letts, United States District Judge.

[fols. 98 & 99] IN UNITED STATES DISTRICT COURT

MOTION FOR EXTENSION OF TIME FOR FILING TRANSCRIPT OF RECORD ON APPEAL (ADMIRALTY NOS. 1646 AND 1647)—Entered and Filed August 22, 1931

Time for filing transcript of record on appeal is extended to August 29, 1931.

Enter.

Ira Lloyd Letts, United States District Judge.

Citations, in usual form, showing service on Joseph E. Fitzpatrick, omitted in printing.

[fol. 100] IN UNITED STATES DISTRICT COURT

PRÆCIPE IN ADMIRALTY NO. 1646—Filed July 29, 1931

To Alice Peckham, Clerk:

You are requested to prepare a transcript of record to be filed in the Circuit Court of Appeals for the First Circuit, pursuant to a notice and petition on appeal allowed

in the above-entitled cause, and to include in such transcript of record the following papers, to wit:

1. The libel.
2. The warrant and monition.
3. The answer and exceptions in admiralty.

[fol. 101] 4. The order of consolidation for hearing with Admiralty No. 1647 (oral).

5. The transcript of testimony.
6. The opinion.
7. The findings of fact.
8. The conclusions of law.
9. The decree dismissing libel.
10. Notice and petition on appeal.
11. Assignment of errors.
12. Citation on appeal.
13. Libellant's exceptions.
14. Libellant's bill of exceptions.
15. Motion for extension of time for filing transcript.
16. Motion for extension of time for filing transcript.
17. Stipulation of consolidation.
18. Præcipe.

Henry M. Boss, Jr., United States Attorney.

In United States District Court

Præcipe in Admiralty No. 1647—Filed July 29, 1931

To Alice Peckham, Clerk:

You are requested to prepare a transcript of record to be filed in the Circuit Court of Appeals for the First Circuit, pursuant to a notice and petition on appeal allowed in the above-entitled cause, and to include in such transcript of record the following papers, to wit:

1. The libel.
2. The warrant and monition.
3. The answer and exceptions in admiralty.
4. The order of consolidation with Admiralty No. 1646 (oral).
5. Findings of fact.
6. Conclusions of law.

7. Decree dismissing libel.
[fol. 102] 8. Notice and petition on appeal.
9. Assignment of errors.
10. Citation on appeal.
11. Libellant's exceptions.
12. Libellant's bill of exceptions.
13. Motion for extension of time.
14. Stipulation of consolidation.

Henry M. Boss, Jr., United States Attorney.

Clerk's certificate to foregoing transcript omitted in printing.

[fols. 103 & 104] Minute entry of argument and submission, January 8, 1932, omitted in printing.

[fol. 105] In United States Circuit Court of Appeals for the First Circuit, October Term, 1931

No. 2607

United States of America, Libellant, Appellant,

v.

Frank Cook, Claimant, Appellee

Appeal from the District Court of the United States for the District of Rhode Island

Before Bingham, Wilson, and Brewster, JJ.

Opinion of the Court—Filed March 18, 1932

Bingham, J.:

For the purpose of this appeal two causes tried in the federal District Court of Rhode Island were consolidated. The first is a libel brought by the United States against the British Motor Vessel Mazel Tov, to effect the collection of certain penalties assessed against the master for vio-

lations of the Revenue laws of the United States. Their assessment and collection are based on the following grounds: (1) for failure to produce a manifest of the cargo; (2) for having on board merchandise not described in the manifest; and (3) for having arrived within the limits of Collection District No. 4 (Massachusetts) and attempting to depart therefrom without making entry. The first two grounds are alleged to be violations of Section 584 of the Tariff Act of 1930, and the third a violation of Section 585 of that Act.

The second is a libel seeking the forfeiture of the cargo [fol. 106] (403 sacks and six bottles of distilled spirits) valued at $14,286.18, on the ground that it was found on board a vessel bound for the United States, within four leagues of the shore, consigned to the master of the vessel, and was not included or described in the manifest, in violation of Section 584 of the Tariff Act.

The libel, seeking collection of penalties out of the vessel, was dismissed and the vessel ordered returned to its owners or their agent. The libel for the forfeiture of the cargo was also dismissed and the cargo ordered placed upon the vessel in the custody of its owners or their agent; and, decrees of dismissal having been entered in each case, appeals were taken to this court.

In the District Court it was found that, on the evening of November 1, 1930, at about five minutes after six, the Mazel Tov was boarded by officers of the Coast Guard on the destroyer Tucker when eleven and one half miles distant from the nearest point of land off the coast of Massachusetts. When the Mazel Tov was first seen she was under way and headed for Gay Head, the southwesterly point of Martha's Vineyard. Having apparently observed the approach of the Tucker, she changed her course to sea, but, on being overtaken, promptly stopped when signalled so to do. An officer of the Tucker upon boarding the Mazel Tov demanded her manifest, which the court below found was produced. A search of the vessel, thereafter made, disclosed that her sole cargo, outside of sea stores, consisted of four hundred and three sacks and a few bottles of whiskey, cleared at St. Pierre on October 16, 1930, which were not included or described in her manifest; and, while the cargo was about one-fourth the quantity which the vessel could carry, it was specifically found

that the Tov had, at no time, been within three miles of the United States nor within the limits of the United States; that she sailed from a foreign port and that it was intended that the liquors on board her should be transhipped to contact boats and landed in the United States; that the speed of the Mazel Tov was between nine and ten knots an hour and insufficient for her to reach the shore of the United States in an hour's time; that the value of the [fol. 107] liquor was $14,286.18; and that the notice of the penalties, assessed by the administrative officer of the customs, and the form thereof, notifying the master of their assessment, in the sums of $500, $5,000 and $14,236.19, were sufficient, and that the assessments had not been paid.

The penalty of $500 assessed against the master for not producing a manifest was denied, on the ground that the paper produced on the demand of the Coast Guard officer was a manifest within the meaning of Section 584.

The penalty of $14,286.18, for having on board the vessel merchandise not included or described in the manifest, was denied on the ground that the seizure was made beyond the three-mile limit and not within an hour's run of the vessel to the nearest shore, as prescribed in the treaty between the United States and Great Britain of May 22, 1924 (43 Stat. 1761). In other words, that in so far as the provisions of Section 581 of the Tariff or Customs Act of 1922, reenacted in 1930, fixed the distance (four leagues or twelve miles) from the shore within which a vessel bound for the United States may be boarded and, if found to be violating the revenue laws of the United States, may be seized, they had been abrogated as to intoxicating liquors.

As to the penalty of $5,000, for departing or attempting to depart from a "collection district" in violation of the provisions of Section 585, it was held that the vessel was not liable for the reason that, at the time the Mazol Tov was signaled to stop, she had not arrived within the limits of any collection district; that a collection district does not extend out to sea for a greater distance than three miles from shore.

The only errors assigned and here relied on, as to the libel asserting penalties against the vessel, are: (1) whether the treaty of May 22, 1924, changed or amended the four league limit fixed in the various provisions of our

revenue laws and, in particular, as fixed in Section 581 of the Tariff Act of 1922, or has or was intended to have any application to the situations provided for and governed by those provisions; and (2) if the treaty did not amend Section 581 in the particular above specified, whether, under [fol. 108] the evidence and facts found, the vessel, when she came within four leagues or twelve miles of the shore, was bound for the United States so that the provisions of Sections 581 and 584 became applicable and subjected her to seizure and to the collection of the penalties assessed against her master.

The only penalties, as to which any contention is made before us on this appeal, are those for $14,286.18, the value of the merchandise, and for $5,000 for departing from a collection district without entry.

The first question is whether the treaty of May 22, 1924, amended that clause of Section 581 of the Tariff Act of 1922, fixing a coast line four leagues from our shore as the bound with respect to which any vessel coming within the same should, if requested, produce a manifest or be subject to the penalties prescribed in Section 584, which provisions Congress has made for the protection of our commerce and the enforcement of our customs-revenue laws.

As to this we are of the opinion that the District Court was in error; that the High Contracting Parties, in making the treaty of May 22, 1924, did not intend to alter and did not thereby effect a change in the customs-revenue laws of the United States, wherein Congress had fixed a four league protective zone. At the time the treaty was made the Eighteenth Amendment to the Constitution was in force and the National Prohibition Act was in existence, having been enacted by Congress in 1919. By both the Amendment and the National Prohibition Act the importation of intoxicating liquors into the United States and all territory subject to its jurisdiction was prohibited.

The Eighteenth Amendment (40 Stat. 1050), in Section 1, provided:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of *intoxicating liquors* within, the *importation thereof* into, or the exportation thereof from *the United States and all terri-*

tory subject to the jurisdiction thereof for beverage purposes is hereby *prohibited.*"

[fol. 109] And Section 3, Title II of the National Prohibition Act (41 Stat. 305) provided:

"Sec. 3. *No person shall* on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, *import,* export, deliver, furnish or possess any *intoxicating liquor* except as authorized in this Act, and all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented."

November 23, 1921, Congress passed an act supplemental to the National Prohibition Act (42 Stat. 222) and in Section 3 thereof defined the territorial field to which the Act applied, as follows:

"Sec. 3. That this Act and the National Prohibition Act shall apply not only to the United States but to all *territory* subject to its jurisdiction. * * *"

And the Supreme Court in Cunard S. S. Co. v. Mellon, 262 U. S. 100, 120-122, prior to making the treaty, had held that the term "importation" as employed both in the Eighteenth Amendment and in the National Prohibition Act had a broader meaning than in the customs-revenue laws; that under the former the bringing of intoxicating liquors for beverage purposes within the three mile limit, though without intending to land, was forbidden importation, although under the customs-revenue laws the bringing of such intoxicating liquors within the three mile limit without intending to land was not a forbidden importation. See also Alksne v. United States, 39 Fed. (2d) 62, 67, 68.

And in construing the meaning of the word "territory" (p. 122) as used in the Eighteenth Amendment, in the phrase "the United States and all *territory* subject to the jurisdiction thereof," the court had held that it meant "the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power"; that "the immediate context and purport of the entire section show that the term is used in a physical and not in a metaphorical sense,—that it refers to *areas* or *districts* having fixity of location and recog-

nized boundaries. See United States v. Bevans, 3 Wheat. [fol. 110] 336, 390"; and that the term "territory" as used in the supplemental act, above quoted, means "that its field coincides with that of the Eighteenth Amendment" (page 127).

In explaining the extent or boundaries of the regional areas of land and water over which the United States claims and exercises dominion and control as a sovereign power (page 122), it said:

"It now is settled in the United States and recognized elsewhere that the territory *subject to its jurisdiction* includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a *marginal belt of the sea extending from the coast line outward a marine league,* or three geographic miles."

Then again, in speaking of the applicability of the National Prohibition Act and the above quoted supplemental provision, with reference to domestic and foreign vessels when within or without the waters extending outward three miles from the coast line (p. 127), it said:

"There is in the act no provision making it applicable to domestic merchant ships when outside the waters of the United States, nor any provision making it inapplicable to merchant ships, either domestic or foreign, when within those waters, save in the Panama Canal."

And in concluding its discussion as to the territorial applicability of the Act (pp. 128, 129), it said:

"Examining the act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the *territorial limits* of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside the *territorial waters* of the United States, and thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise.

"In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over

them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign; for it long [fol. 111] has been settled that Congress does have such power over them. Lord v. Steamship Co., 102 U. S. 541; The Abby Dodge, 223 U. S. 166, 176. But we do mean that the National Prohibition Act discloses that it is intended only to enforce the Eighteenth Amendment and limits its field of operation, like that of the Amendment, to the territorial limits of the United States."

A further question was involved in Cunard S. S. Co. v. Mellon. It there appears that foreign ships from an early day had exercised "the practice of carrying intoxicating liquors for beverage purposes as a part of a ship's sea stores," and the Steamship Company made the contention that neither the Amendment nor the Act itself could have been intended to disturb that practice within our territorial waters and ports. But the court held that "the avowed and obvious purpose of both the Amendment and the Act was to put an end to prior practices respecting such liquors, even though the practices had the sanction of antiquity, generality and statutory recognition."

This decision was rendered April 30, 1923. It brought to light an apparent lack of unchallenged power on the part of the United States to search and seize foreign vessels outside the three mile limit, in the enforcement of the Eighteenth Amendment and the National Prohibition Act in so far as they prohibited the importation of intoxicating liquor into its territorial waters—within one league of its coast.

It also made clear the inability of British vessels, if the Prohibition Act was to be enforced, to bring liquors that were sea stores within our territorial waters and ports.

With these difficulties confronting the two nations, they negotiated the treaty of May 22, 1924, in which, in Article I, they reaffirmed what had previously been the universal understanding (Cunard S. S. Co. v. Mellon, p. 122) that "3 marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters."

It is apparent that this provision of Article I did not settle the difficulties which brought the High Contracting Parties together. But in Article II provisions were inserted authorizing the United states to exercise powers, without ob-

[fol. 112] jection, which theretofore the British government had questioned.

In subdivision 1 of that Article "His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag *outside the limits of territorial waters* by the authorities of the United States, * * * in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are *endeavoring to import* or *have imported alcoholic beverages* into the United States, * * * in violations of the laws there in force, etc."

The more important clause, as concerned the United States, is found in subdivision 2 of that Article, which provides:

"If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, * * * *prohibiting the importation of alcoholic beverages*, the vessel may be seized and taken into a port of the United States, * * * for adjudication in accordance with such laws."

The only substantial limitation on the exercise of the right of visitation, search and seizure, given or recognized in these subdivisions of Article II, is contained in subdivision 3, which provides that they "shall not be exercised at a greater distance from the coast of the United States * * * than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense," or where "the liquor is intended to be conveyed to the United States * * * by a vessel other than the one boarded and searched, it shall be the speed of such other vessel, and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised."

It is apparent from the situation confronting the contracting parties and from these provisions of Article II that the United States was contracting for and obtaining the privilege or right, without objection on the part of the British government, of boarding and examining British vessels outside the three mile limit for the purpose of ascertaining [fol. 113] whether such vessels or those on board had imported, were importing or were attempting to import alco-

holic beverages into the United States in violation of its laws prohibiting the importation of alcoholic liquors; and that, if it found reasonable cause to believe that the vessel or those on board had committed or were committing or attempting to commit an offense against such laws, it could seize the vessel and have the same adjudicated and forfeited in accordance with those laws.

There is nothing in Article II or its subdivisions showing that the United States was undertaking to acquire any right or privilege as to the enforcement of its customs-revenue laws as exemplified in Sections 581 and 584 of the Tariff Act of 1922, which are the same as the like numbered sections in the Tariff Act of 1930, and contain provisions such as have been a part of every tariff act passed by Congress beginning with the Act of 1790 (1 Stat. 145), which introduced the four league limit (s. 31, p. 164) of the British hovering statutes. See 9 George 2d, C. A. P. 35 (1736); Arch v. United States, 13 F. (2d) 382. Neither the Tariff Act of 1922 nor of 1930 prohibits the importation of alcoholic beverages. Sections 581 and 584 clearly do not prohibit their importation and consequently it cannot reasonably be said that the High Contracting Parties in Article II of the treaty were undertaking to or did there stipulate with reference to our customs-revenue laws, and particularly Sections 581 and 584 containing provisions which had been embraced in the customs-revenue statutes of this government since its foundation and which did not prohibit importation of alcoholic liquors. Gillam v. United States, 27 Fed. (2d) 296, 300, 301; Miller v. United States, 49 Fed. (2d) 368, 369; certiorari denied in 283 U. S. 866.

The fact that Congress in 1930 reenacted Sections 581 and 586 of the Tariff Act of 1922, without change, each of which sections contained the "four leagues of the coast" provision, is practically conclusive evidence that Congress did not regard or understand that these sections of the Act of 1922 were amended by the treaty.

Having reached the conclusion that the treaty of 1924 did not repeal or abrogate the clause fixing a four league zone in our customs-revenue laws (including Section 581), [fol. 114] the next question is, whether the Mazel Tov may be charged with the payment of the penalty of $14,286.18 assessed against the master for having on board merchandise not included or described in the vessel's manifest.

The Tariff Acts of 1922 and 1930, in Section 584, provide:

"Any master of any vessel * * * bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after having been unladen from said vessel * * * which is not included or described in said manifest or does not agree therewith, the master of such vessel * * * shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel * * * shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel * * * the master * * * shall be subject to a penalty of $500; etc."

And Section 594 of those Acts provides:

"Whenever a vessel * * *, or master * * * has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel * * * shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same; etc."

In the District Court, as above pointed out, the penalty in question was denied, not on the ground that the vessel was not subject to the penalty, in case the provisions of Sections 581 and 584 of the Act of 1922 were not amended by the treaty of 1924, but solely on the ground that they were so amended and Congress by reenacting these sections in the Act of 1930 did not intend to alter the treaty. We think that all the facts essential to the assessment of the penalty of $14,286.18 against the master under Section 584, and its collection out of the vessel under Section 594, have been found by the court below, unless it be the fact whether the vessel, when it came within four leagues of our shore, was bound for the United States. This matter the District Court either regarded as covered by his findings, or inadvertently overlooked. He specifically found [fol. 115] that the vessel sailed from Saint Pierre, a foreign port; that it was intended that the liquors on board her should be transhipped to contact boats and landed in

the United States; that when hailed and boarded she was less than four leagues from the nearest shore; and that the liquors were not included in her manifest. And the evidence further shows that, when the Mazel Tov was first seen she was 100 miles or so off her course to Nassau; that some fifteen days had expired since she left Saint Pierre; that she was then less than four leagues from shore, was under way headed for Gay Head, the southwesterly point of Marthas Vineyard, at night and without lights. Upon this showing we conclude that she was in fact and in law bound for the United States within Section 584 [The Marion Phillis, 36 Fed. (2d) 688 (2d Cir.); The Newton Bay, 36 Fed. (2d) 729, 731 (2d Cir.); Miller v. United States, 49 Fed. (2d) 368, 369 (4th Cir.)], and that the District Court erred in not holding that the seizure of the vessel was lawful and that she was subject to having the penalty assessed against the master collected out of her.

The conclusion of the District Court that the vessel could not be held for the payment of the penalty of $5,000 assessed against the master for the alleged violation of Section 585, we think, was right; for, on the facts found, the Mazel Tov did not enter or arrive within the limits of the Massachusetts Collection District or any other collection district of the United States. In the opinion of that court it is clearly pointed out that the collection district of Massachusetts only extends out three miles from the shore of that State, not to a point four leagues from shore.

A contrary view was taken by the Circuit Court of Appeals for the Fourth Circuit in Miller v. United States, 49 Fed. (2d) 368, and in support of its position it cited two cases—Harrison v. Vose, 9 How. 372, 380, and The Cherie, 13 Fed. (2d) 992. The latter case arose in this circuit. The provision of the Tariff Act which we there had under consideration was Section 586, not Section 585, which was the one involved in the Miller case, and is here. Section 586 authorizes the exercise of certain power or authority after the vessel's "arrival within four leagues of the coast of the United States." That provision is not contained in [fol. 116] Section 585. The exercise of the power authorized by Section 585 is when the vessel "arrives within the limits of any collection district and departs, or attempts to depart, etc." It is reasonable to suppose that Congress, in using the term "collection district" in 585, did not intend

that it should extend beyond the territorial jurisdiction of the United States, which the Supreme Court clearly points out in Cunard S. S. Co. v. Mellon, does not extend beyond three miles from the shore, and that in using the different terms in the two sections, they did so advisedly, and as meaning different areas. If the terms mean substantially the same, as contended by the government, it is strange that Congress did not use the same phrase in Sections 585, 586 and 581. However, our decision in The Cherie does not sustain the position taken by the Fourth Circuit as to this question; and we fail to see what bearing the other case cited (Harrison v. Vose) has to do with it. The court there did not have under consideration what the term "collection district" meant and manifestly did not hold that a collection district extended out four leagues from the shore.

The only remaining question relates to the forfeiture of the cargo on the ground that it was found on board the vessel bound for the United States, within four leagues of the shore, consigned to the master of the vessel and not included or described in the manifest as required by Section 584. The master, in his claim and answer to the libel, sets himself up as the consignee and claimant of the cargo of liquors, thereby admitting that the cargo was consigned to him. This fact and the other facts specifically found by the District Court fulfill all the requirements for an adjudication forfeiting the liquors under Section 584. Apparently the only reason for a contrary holding in the District Court as to this was that this section was amended by the treaty of 1924. There could have been no other reason for dismissing this libel and not ordering a forfeiture of the liquors.

The decrees of the District Court dismissing the libels are vacated and the cases are remanded to that court for further proceedings not inconsistent with this opinion.

[fol. 117] In United States Circuit Court of Appeals

Final Decree—March 18, 1932

This cause came on to be heard January 8, 1932, upon the transcript of record of the District Court of the United

States for the District of Rhode Island, and was argued by counsel:

Upon consideration whereof, It is now, to wit, March 18, 1932, here ordered, adjudged and decreed as follows: The decrees of the District Court dismissing the libels are vacated and the cases are remanded to that court for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

Arthur I. Charron, Clerk.

Thereafter, to wit, on April 20, 1932, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 118] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1932

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,771. U. S. Circuit Court of Appeals, First Circuit. Term No. 82. Frank Cook, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed May 16, 1932. File No. 36,771.

FILE COPY

MAY 16 1
CHARLES ELM

In the Supreme Court of the United States

OCTOBER TERM, 1931

FRANK COOK
PETITIONER

vs.

THE UNITED STATES OF AMERICA

No. 82

Petition for a Writ of Certiorari and Brief in Support Thereof

EDMUND M. TOLAND
JOSEPH E. FITZPATRICK
MORTIMER W. NEWTON
Counsel for Petitioner

Remington Press, Providence, R. I.

INDEX

	Page
Petition for Writ of Certiorari	1
Question Presented	1
Statement of the Case	2
Brief in Support of Petition for Writ of Certiorari	7
Statement of the Case	7
Argument	9
Summary of Argument	9
POINT I. Whether or not the Circuit Court erred in holding that the treaty entered into between the United States and Great Britain proclaimed May 22, 1924 (43 Stat. 1761) limit search and seizure provision of the Tariff Act of 1930 to British vessels within one hour's travel to the coast of the United States.	
Conclusion	14

TABLE OF CASES CITED

Ford et al. vs. United States, 273 U. S. 593, 47 S. Ct. 531, 71 L. Ed. 793	9
Miller vs. United States, 49 Fed. (2d) 368, 51 S. Ct. 667	13
Rainey vs. United States, 194 U. S. 315	12
Ribas y Hijo vs. United States, 232 U. S. 310	12
The Frances Louise, 1 Fed. (2d) 1004	12
The Henry L. Marshall, 286 Fed. 260, (1922 S. D. N. Y.)	10
The Louise F., 293 Fed. 933 (1923 D. C. Florida)	10
The Madeline D., 12 Fed. (2d) 137 (1926 D. C. S. D. Alabama)	10
The Over the Top, 5 Fed. (2d) 838	12
The Panama, 6 Fed. (2d) 326	12
The Sagitind, 11 Fed. (2d) 673	12
United States vs. 26 Diamond Rings, Fed. Cases No. 16572	11

OTHER AUTHORITIES CITED

The Act of 1790, 1 Stat. 145, 155, 156 and 157	11
The Law of Territorial Waters and Maritime Jurisdiction—Jessup, Page 267	10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

FRANK COOK

PETITIONER

vs.

THE UNITED STATES OF AMERICA

RESPONDENT

No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

To the Honorable, Supreme Court of the United States:

Your petitioner, Frank Cook, of Lunenburg, Nova Scotia, claimant of the British Motor Screw "Mazel Tov," hereby makes application to the Supreme Court of the United States for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit to reverse the judgment of said Circuit Court of Appeals dated the 18th day of March, A. D. 1932, which judgment reversed in part decrees of the District Court of Rhode Island, and for his petition therefor respectfully shows as follows:

QUESTION PRESENTED

Whether or not the Circuit Court erred in holding that the Treaty with Great Britain relative to smuggling of intoxicating liquors did not limit search and seizure provisions of the Tariff Act of 1930 to British vessels within one hour's travel from the coast of the United States.

STATEMENT OF THE CASE

This case is a proceeding in admiralty on the part of the United States seeking the assessment of penalties against the British Motor Screw "Mazel Tov" and the forfeiture of her cargo.

The libels filed November 25, 1930, asking for the collection of penalties under Sections 584 and 585 of the Tariff Act of 1930, their assessment and collection being based on the following grounds:

(1) For failure to produce a manifest of the cargo.

(2) For having on board merchandise not described in the manifest.

(3) For having arrived within the limits of the Collection District and attempting to depart therefrom without making entry.

Soon after the vessel was seized, to wit, on the first day of November, A.D. 1930, notice of claim was filed by Frank Cook of Lunenburg, Novia Scotia, the petitioner. The claimant's answer and amendment thereto and exceptions were filed on December 2, A.D. 1930.

The case was called for hearing upon libel and answer, and at the conclusion of the presentation of evidence on behalf of the Government and the claimant the Court reserved decision. On May 16, A.D. 1931, the Judge of the District Court for the District of Rhode Island dismissed the libel seeking the collection of penalties against the vessel and dismissing the libel seeking the forfeiture of the cargo ex-British Motor Screw "Mazel Tov", and the final decrees were entered and filed on May 22, A.D. 1931. (R. 83-85.)

It appears from the Record that at the time the "Mazel Tov", was hailed and stopped by the Coast Guard vessel she was 11½ miles from the shores of the United States. (R. 41.) It also appears from the transcript of testimony that the speed of the vessel was between nine and ten knots an hour. (R. 56.)

Among the finding of facts by the District Court Judge were:

1. That the British Motor Screw "Mazel Tov" at no time was within three miles of the United States nor within the limits of the United States.

2. That the speed of the British Motor Screw "Mazel Tov" was between nine and ten knots an hour.

3. That when stopped by the Coast Guard, a manifest was produced. (R. 89, 90.)

Among the conclusions of law by the District Court Judge were:

1. The court holds that under the provisions of Section 584 of the Tariff Act of 1930 the master of the British Motor Screw "Mazel Tov" did not become liable to pay a penalty of Five Hundred ($500.00) Dollars for not producing a manifest to the coast guard officer who demanded it and that the paper introduced by the claimant constituted a manifest within the meaning of Section 584 of the Tariff Act. (R. 90.)

2. The court holds that under the provisions of Section 584 of the Tariff Act of 1930 the master of the British Motor Screw "Mazel Tov" did not become liable to a penalty of $14,286.18 for having on board said vessel merchandise not included or described in any manifest because the seizure was made beyond the three-mile limit and not in conformity with the Treaty entered into between the United States and Great Britain, proclaimed May 22, 1924. 43 Stat. 1761. (R. 90.)

3. The court holds that the master of the British Screw "Mazel Tov" did not become liable to a penalty of $5,000.00 for departing or attempting to depart from any collection district contrary to the provisions of Section 585 of the Tariff Act of 1930 because at the time the British Motor Screw "Mazel Tov" was directed or signalled to stop by the United States Coast Guard she had not arrived within the limits of the territorial waters of the United

States which extend out to sea for a distance of three miles from shore.

4. The court holds that, under the provisions of Section 594 of the Tariff Act of 1930, the British Motor Screw "Mazel Tov" has not become subject to the penalties of $500, $5,000 and $14,286.18 assessed against her master and that said vessel shall not be held for the payment of such penalties. (R. 90, 91.)

The only questions presented to the said Court of Appeals were:

(1) Whether the treaty of May 22, 1924, changed or amended the four league limit fixed in the various provisions of our revenue laws and, in particular, as fixed in Section 581 of the Tariff Act of 1922, or has or was intended to have any application to the situations provided for and governed by those provisions.

(2) If the treaty did not amend Section 581 in the particular above specified, whether, under the evidence and facts found, the vessel, when she came within four leagues or twelve miles of the shore, was bound for the United States so that the provisions of Sections 581 and 584 became applicable and subjected her to seizure and to the collection of the penalties assessed against her master.

The only penalty as to which any contention was made before the Circuit Court of Appeals, are those for $14,286.18, the value of the merchandise, and for $5,000.00 for departing from a collection district without making entry. The Circuit Court of Appeals held that the vessel became liable for the penalty of $14,286.18 and held that the District Court judge was in error in holding that the British-American Treaty of May 22, 1924 dealt completely with the subject of the limits within which search and seizure of British vessels could be made in the enforcement and application of our laws for the prevention of importation or smuggling of liquor and that the treaty

excluded all extra-territorial seizures not made in conformity with the terms of the Treaty.

The Circuit Court of Appeals sustained the finding of the Court below that the vessel could not be held for the payment of $5,000.00 assessed against the master for the alleged violation of Section 585 of the Tariff Act. (R. 175.)

Respectfully submitted,

EDMUND M. TOLAND,
JOSEPH L. FITZPATRICK,
MORTIMER W. NEWTON,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

FRANK COOK

PETITIONER

vs.

THE UNITED STATES OF AMERICA

RESPONDENT

No.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

On May 26, 1930, a libel was filed by the Government seeking the collection of certain penalties against the British Motor Screw "Mazel Tov" and the forfeiture of her cargo owned by Frank Cook, the petitioner in this case. Subsequently, upon a hearing of said libel and the answer and evidence of the claimant, the court after hearing the evidence, presented by the libellant and the libellee took the case under advisement, and, on the 16th day of May, 1931, rendered its opinion.

The Court said in its opinion. (R. 69.)

> "The third view as to the effect of this treaty, and the one which I believe is supported by the majority of present authorities and by the soundest reasoning, is that it dealt completely with the subject of the limits within which search and seizure of British vessels could be made in the enforcement and application of our laws for the prevention of the importation or smuggling of liquor, and that the treaty excludes all extra-territorial seizures (that is beyond the three-mile limit), not made in conformity with the terms of the treaty. That such was the intention of the parties is apparent from the statement made by Secretary

Hughes, who negotiated the treaty with the British Government, in his note of July 10, 1923, to the British Embassy wherein he said:

"It may confidently be asserted that there would be no disposition on the part of the American authorities, and the special agreement would not justify any attempt, to seize a British vessel, save within the limits proposed, and when it was clear that the vessel concerned was directly involved in an attempt to introduce its illicit cargo into the territory of the United States."

MS. Records, Department of State.

It is a matter of common knowledge that prior to entering into the treaty agreement the British Government had on several occasions protested against the seizure of boats of British registry outside the three-mile limit which carried cargoes of liquor. This situation existed at the time the treaty was negotiated and the convention entered into.

The treaty says:

"The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States . . . than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense."

Can it be seriously urged that after entering into this treaty there remained in all cases the same maximum authority which had before been asserted and which was the cause of the differences to be settled?

On May 25, 1931, the United States appealed from the decree of May 22, 1931, and on March 18, 1932, the Circuit Court of Appeals for the first Circuit entered an order vacating the decrees entered in the District Court in part, that the vessel should be held for penalties assessed against the master in the amount of $14,286.18 and forfeiture of the cargo ex-British Motor Vessel, "Mazel Tov."

ARGUMENT

The argument will be confined to the question involved as follows:

Whether or not the Circuit Court erred in holding that the Treaty entered into between the United States and Great Britain proclaimed May 22, 1924 (43 Stat. 1761) limit search and seizure provision of the Tariff Act of 1930 to British vessels within one hour's travel to the coast of the United States.

Owing to the conflict of decisions in the Lower Courts, the question presented by your petitioner here, is one that should be definitely settled. The Circuit Court of Appeals for the First Circuit arrived at the conclusion that the British-American treaty of May 22, 1924, did not place a limit on sections 581 and 584 of the Tariff Act of 1922, which are the same as the like numbered sections in the Tariff Act of 1930. The real important part of the British-American treaty of 1924 is paragraph (3) of article (2) which provides:

> "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense."

The ruling of the Circuit Court of Appeals for the First Circuit seems to your petitioner to be in conflict with the decision of this Court in the case of *Ford et al. vs United States, 273 U. S. 593, 47 S. Ct. 531, 71 L. Ed. 793, in which this honorable* Court said through Mr. Chief Justice Taft at page 618 of 273 U. S.:

> "The parties were dealing with a situation well understood by both. In effect they wished to enable the United States better to police its seaboard, by enabling it *within an hour's sail* from its coast, beyond its territorial jurisdiction, and on the high seas, to seize British actual or would-be smugglers of liquor and, if they were caught, to proceed criminally against them as if seized within the 3-mile limit

for the same offenses in reference to liquor importation. No particular laws by title or date were referred to in the treaty, but only the purpose and effect of them." The court referred specifically to both the National Prohibition and tariff legislation, and on page 619 of 273 U. S., 47 S. Ct. 531, 540 says: Any law, the enforcement of and punishment under which will specifically prevent smuggling of liquor, should be regarded as embraced by the treaty."

The British Government has at all times prior to the British-American treaty of 1924 objected to any search or seizure of one of her Nationals outside of the territorial waters, namely, outside of the three-mile limit.

The "Henry L. Marshall"
286 Fed. 260
(1922 S. D. N. Y.)

The "Louise F"
293 Fed. 933
(1923 D. C. Florida)

The "Madeline D"
12 Fed. (2d) 137
(1926 D. C. S. D. Alabama)

With none of the foregoing cases nor in the instant cases are we concerned with the proposition that every nation has the right to bind its own subjects to its own laws in every other place.

"The right of jurisdiction over vessels owned by its subjects authorizes by this Government the detention and commands the capture of the vessel found on the high seas if, upon reasonable grounds, it is believed to be owned by its subject and would be engaged in violating its laws."

The Law of Territorial Waters and Maritime Jurisdiction — Jessup. Page 267.

The cases above referred to, all of which were prior to the British American Treaty of 1924, indicate to our minds that

the Tariff laws were not applicable to vessels flying a foreign flag unless such vessels came within the territorial limits of the United States. As far back as the Act of August 4, 1790, it was permitted to inspect within four leagues all ships bound to the United States, and the Act provided penalties for failure to carry and produce a manifest upon arrival within that distance. But this Act and the Act of 1799 (which is substantially the same) applied only to incoming vessels belonging wholly or in part to citizens of the United States. No evidence in the instant cases was introduced to show that the British ship "Mazel Tov" or her cargo were owned wholly or in part by any citizen of the United States.

United States vs. 26 Diamond Rings
Fed. Case No. 16572
The Act of 1790
1 Stat. 145, 155, 156 and 157

In the instant cases the United States does not seem to take the view that the acts complained of in their libel constitute an infraction of our Tariff Laws by reason of their invoking in their libel the aid of the British-American Treaty of 1924.

(Record, Page 4.)

It is the contention of the petitioner that the Treaty deals completely with the extreme right of seizure upon which initial jurisdiction of the cause of forfeiture or penalty must depend, and that the Treaty excludes all extra-territorial seizures, namely those outside of the three-mile limit not made in conformity with the terms of the Treaty. It cannot be logically argued that if the foregoing observations were not true the British Government would have, as outlined supra on so many occasions, protested against seizure of boats of British registry outside of the three-mile limit, and again, if there were no differences regarding the authority of the United States concerning extra-territorial jurisdiction, there would be nothing remaining to be settled by the Treaty.

Judge Morton, in the case of the *"Frances Louise" 1 Fed. (2d) 1004*, said:

> "I have great doubt whether any such broad right of seizure exists as the Government contends, but it is not necessary to decide this question, because I am clearly of the opinion that the whole situation is covered by the Treaty . . . If so, upon familiar principles of law, it is conclusive."

The "Sagitind"
11 Fed. (2d) 673

The "Panama"
6 Fed. (2d) 326

The "Over the Top"
5 Fed. (2d) 838

Since the Treaty, therefore, deals completely with this sort of case, and the speed of the British Motor Ship "Mazel Tov" was found not to be in excess of ten knots per hour, there remains upon her no obligation under the Treaty made law to produce a manifest since she was more than one hour's sailing distance from the nearest American territory. The fact remains, however, that in spite of no obligation being incumbent upon the master of the "Mazel Tov" to produce a manifest under the terms of the Treaty when ordered to do so at the point of seizure, he did produce a manifest as testified to by the Government's own witnesses, and which was introduced in evidence at the hearing of the Court below.

From the foregoing facts there could not be and there was not, in view of the provisions of the Treaty, any violation of Section 584 of the Tariff Act of 1930 as alleged in the Government's first and second cause for penalties. It might be argued that there is an inconsistency between the Treaty and the Tariff Act of 1930, and that the rule is the one most recent in point of time controls.

Ribas y Hijo vs. United States
194 U. S. 315

Rainey vs. the United States
232 U. S. 310

The sections of the Tariff Act with which we are concerned in the present instance are identical with the wording of the same sections in the Tariff Act of 1922, and it can not be argued that in the absence of a substantial or material change in the sections in the Tariff Act of 1930 it was the intention of Congress to change the status which "were in effect at the time of the signing of the British Treaty in 1924."

Of the several cases wherein penalties were demanded by the Government for a violation of sections 584 and 585 of the Tariff Act of 1922, the question of whether or not the British-American Treaty excludes all extra-territorial seizures not made in conformity with the terms of the Treaty has never been determined. In the "Metmuzel" case in an opinion written by Judge Parker, the question of the effect of the British-American Treaty on the enforcement of the various sections of the Tariff Act of 1922 was not discussed.

Miller vs. United States, 49 Fed. (2d) 368, certiorari denied 51 S. Ct. 667. In the instant case, however, the British-American Treaty of May 22, 1924, was brought directly into the case by the Government itself when it alleged in its libel seeking a penalty for the violation of Sections 584 of the Tariff Act of 1930, as follows:

> That heretofore, to wit, on the 1st day of November A.D. 1930, on the navigable waters of the United States, to wit, about 9⅞ miles from No Man's Land in the State of Massachusetts and within a Collection District of the United States Customs Service, said Frank Cook, who was then and there master of said British Motor Screw "Mazel Tov," which was then and there bound to the United States, failed to produce the manifest of the cargo of said vessel upon the demand of an officer of the law, to wit, T. J. Sexton, Lt. Commander in command of the United States Coast Guard Destroyer Tucker, duly authorized to make such demand, contrary to the form of the statute and *of the Treaty between the United States and Great Britain,* in such case made and provided.

If the Circuit Court of Appeals for the First Circuit is correct in its holding, that Sections 584 and 585 of the Tariff Act of 1930 are not limited by the British-American Treaty of May, 1924, your petitioner's question is, simply, why was it necessary that a treaty between Great Britain and the United States should be drawn.

CONCLUSION

The petitioner, therefore, prays that his writ of certiorari be granted for the cause herein set forth and principally because of the alleged violation of the British-American Treaty of 1924.

Respectfully submitted,

EDMUND M. TOLAND,
JOSEPH E. FITZPATRICK,
MORTIMER W. NEWTON.

FILE COPY

AUG 13 1932

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 82

FRANK COOK, *Petitioner,*

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

EDMUND M. TOLAND,
JOSEPH E. FITZPATRICK,
MORTIMER W. NEWTON,
Counsel for Petitioner.

CORNELIUS FORD, PRINTER, WASHINGTON, D. C.

INDEX

PAGE

FORM OF PETITION AND BRIEF NOT FATAL TO GRANTING OF WRIT OF CERTIORARI 2–5

QUESTION PRESENTED PROPERLY RAISED IN ANSWERS AND EXCEPTIONS IN TRIAL COURT 5–16

APPENDIX—

Jurisdiction 16

Reasons Relied Upon for the Allowance of the Writ 16–20

Assignment of Errors 21

Table of Cases

Brockenborough v. *Champion Fibre Co.*, 176 F. 840, 842 (C. C. A. 4th) 15

Crowell v. *Benson*, 285 U. S., 76 L. Ed. Advance Opinions, p. 369, note 17 7

Dodge v. *United States*, 272 U. S. 430 11

Ford v. *United States*, 273 U. S. 593, 606 ..... 8, 11

Furness, Withy & Co. v. *Yang-Tze Insurance Association, Ltd.*, 242 U. S. 430, 434 3

Gainesville v. *Brown-Crummer Co.*, 277 U. S. 54, 59 8

Henning v. *United States*, 13 Fed. (2d) 74, 75 (C. C. A. 5th) 20

In re Johnson, 167 U. S. 120, 126 ..... 10, 13

Knoop v. *Kelsey*, 102 Mo. 291, 10 R. C. L. 701, Sec. 281 16

Mansfield R. Co. v. *Swan*, 111 U. S. 379, 382-384 8

Maul v. *United States*, 274 U. S. 501, 531 12

Milton v. *Pensacola Bank & Trust Co.*, 190 F. 126, 136 (C. C. A. 6th) 15

Morrisson v. *Atkinson*, 16 Okla. 571 16

PAGE

San Juan Light Co. v. *Requena*, 224 U. S. 89, 96, 97 15
Shepard v. *Graves*, 14 How. 504, 510 9
Stratton v. *St. Louis S. W. Ry.*, 282 U. S. 10, 13, 18 8
Sutherland v. *Sutherland*, 102 Ia. 535 15
Tarbul v. *Royal Exc. Shipping Co.*, 110 N. Y. 170 15
The Abbey, Fed. Cas. No. 14 12
The Frances Louise, 1 Fed. (2d) 1004 20
The Marjorie E. Bachman, 4 Fed. (2d) 405, 408 20
The Merino, 9 Wheat. 391, 402 ..... 9, 13
The Merino, supra 9, 10
The Richmond, 9 Cranch 102 ..... 9, 10, 13
The Richmond, supra 10, 13
The Sagatind, 11 Fed. (2d) 673 20
The Underwriter, 13 F. (2d) 433, 434 (C. C. A. 2d Md.) 12

Congressional Record, Vol. 62, Pt. 2, 67th Cong., 2nd Sess., p. 11593 18
Judicial Code, Sec. 240 (a), as Amended by the Act of Feb. 13, 1925 (43 Stat. 936, 938), 28 U. S. C. 347 ..... 2, 4, 16
Rev. Stat., 997; 28 U. S. C. 862; Rule 9 5
Rev. Stat., 3067 18
National Prohibition Act 11, 17
Tariff Act of 1922 and 1930, Sec. 581 and 584, 5, 6, 9, 10, 16, 17, 18, 19
Tariff Act, Sec. 594 21
Treaty with Great Britain of May 22, 1924 (43 Stat. 1761) 6, 8, 9, 11, 12, 14, 15, 16, 18, 19, 20, 21

Rules, Supreme Court of the United States—
Rule 26 3
Rule 27 ..... 3, 5
Rule 38, para. 2 ..... 2, 3, 5
Rule 44 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 82

FRANK COOK, *Petitioner*,

v.

UNITED STATES OF AMERICA

REPLY BRIEF FOR PETITIONER

The Government has filed a memorandum stating that, in view of conflicting decisions upon the question involved and to establish a rule for the guidance of its administrative officers, it does not oppose the granting of the petition for *certiorari*, but it suggests two "difficulties which may stand in the way of a decision of the question."

I.

FORM OF PETITION AND BRIEF NOT FATAL TO THE GRANTING OF WRIT OF CERTIORARI.

It is first suggested that our petition and supporting brief do not comply with the rules of this Court in that they do not (a) refer to the statutory basis of this Court's jurisdiction, (b) contain an assignment of errors, or (c) contain a statement of the reasons relied upon for the allowance of the writ.

These suggestions carry formalism to undue lengths. The Government does not contend, and could not maintain, that the petition and brief do not sufficiently disclose the nature of the case and rulings below and the grounds upon which the review by this Court is sought. The suggestion merely is that the petition and brief are defective in matter of form in that they do not expressly state that review is sought by virtue of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 936, 938), 28 U. S. C. 347, and do not under separate headings list the errors assigned and the reasons for review. In no reported case has this Court ever denied a petition or dismissed a writ of *certiorari* on the express ground of failure to set out these matters in the petition or brief in the formal manner which the Government seems to consider requisite. Neither the rules nor the practice in the Court require that any brief at all be filed in support of a petition of *certiorari*. *Certiorari* has been granted in cases presented upon petition alone. All that is required is that a "summary and short statement of the matter involved and the reasons relied on for the allowance of the writ" (Rule 38, par. 2) shall be included in the petition therefor.

Since no brief at all is required to be filed, the only

contention in the Government's memorandum which requires answer is the suggestion that the "reasons relied upon for the allowance of the writ" are not sufficiently stated. There is no requirement, in the rules or elsewhere, that these reasons be listed *seriatim*. We submit that our petition and the argument filed in its support clearly and succinctly state those reasons.

The Government states that conflicting opinions upon the question here involved makes the case of sufficient importance to warrant granting the writ. It is apparent from this statement that the question is clearly set forth in the petition and brief. The ends of justice will be served by a decision upon the merits even though the Government alleges that there may be some defect in the form of the petition and brief.

The other matters which the Government suggests have been omitted from the petition and brief are a reference to the statutory basis of jurisdiction and an assignment of errors. Rule 27 requires that these two matters be included in all briefs upon the merits, that is, on appeals after jurisdiction has been noted or postponed or on *certiorari* after the writ is granted. It is true that Rule 38, par. 2, provides that if a brief is filed in support of a petition for *certiorari* "it must be direct, concise and in conformity with Rules 26 and 27." But it has never been held that this language requires that a brief in support of a petition of *certiorari* contain all the matters required by Rule 27 for a brief upon final oral argument upon the merits. So to construe that phrase of Rule 38, par. 2, would be to overlook the frequent admonitions of the Court that petitions for *certiorari* must be presented with "studied brevity." *Furness, Withy & Co.* v. *Yang-Tze Insurance Ass'n Ltd.*, 242 U. S. 430, 434.

Since Rule 27 does not in terms apply in full rigor

to cases on petition for *certiorari*, we submit that, in the language of Rule 44, it applies to such cases only "as far as may be," and that consistently with the paramount requirement of brevity, counsel may include in a brief in support of a petition for *certiorari*, if filed, only such additional matter as seems indispensable to amplify the points requiring attention upon the question of granting or denial of the writ. That this is the practical construction which the Bar has given to the rules is demonstrated by the very many briefs in support of petition for *certiorari* at each term which do not contain all the matters of form essential to a brief upon the merits.

But if the petition and brief herein do not strictly comply with the form required by the rules, that it is at most an unwitting failure fully to comply with the rules. It is not a violation of any statute, and raises no question going to the jurisdiction of this Court to grant the writ. We have been unable to find any case (and the Government cites none) in which a petition has been denied or a writ dismissed for the express reason that the petition and the supporting brief were defective in the matters of form here involved, when the matter involved and the grounds for the writ were sufficiently disclosed by the papers presented. As to the reference to the statutory basis of jurisdiction, it is so well understood that the only statute authorizing this Court to issue *certiorari* as an appellate process to the Circuit Court of Appeal is Section 240 (a), Judicial Code, as amended (43 Stat. 936, 938; 28 U. S. C. 347) that, in the interest of brevity we omitted reference to it in our brief. And while we believe that we have sufficiently indicated in our briefs the errors into which, as we contend, the Circuit Court of Appeals has fallen, we filed no separate, formal assign-

ment of errors because no statute requires an assignment of errors on petition for writ of *certiorari;* the statute and rule requiring assignment of errors on appeal (Rev. Stats. 997; 28 U. S. C. 862; Rule 9) has never been construed as applicable to cases on petition for writ of *certiorari;* and we have found no case, and are aware of no practice, construing Rule 38, par. 2, as requiring the inclusion of assignment of errors (pursuant to Rule 27) in briefs in support of petitions for *certiorari.*

There is, therefore, no statute fatal to the granting of this petition, though the petition and brief be considered as not strictly in compliance with the rules as to form; certainly there is nothing to prevent the amendment of the petition and brief to comply with such rules. Out of abundance of caution, therefore, we set out in the appendix hereto a formal assignment of errors, statement of the reasons relied upon for the allowance of the writ, and a reference to the statute by virtue of which review is sought, and request the Court to consider these in amendment of our petition and brief.

II.
QUESTION PRESENTED PROPERLY RAISED IN ANSWERS AND EXCEPTIONS IN TRIAL COURT.

In so far as material on this petition for *certiorari,* this case arose on a libel by the United States to impose penalties and forfeitures upon the British vessel "Mazel Tov" for alleged violation of Section 584 of the Tariff Act of 1930. The answers and exceptions of the petitioner raised *in limine* the contention that the seizure of the vessel was unlawful and that the penalties and forfeiture could not lawfully be imposed

in view of the locality of the seizure (R. 16, 18). The evidence was largely devoted to the questions raised by these exceptions (R. 18-83). The District Court found as a fact that the vessel was seized at a point less than four leagues but more than three miles, from our coast, and at a greater distance than she could traverse in one hour, and then proceeded in its opinion to treat the question whether seizure of a British vessel was warranted on those facts consistently with our Treaty with Great Britain of May 22, 1924 (43 Stat. 1761) (R. 64-83). The Court treated this question of the effect of the Treaty as properly raised by the answers and exceptions, and held that the vessel had been seized in violation of the Treaty, whereupon it dismissed the libels and released the vessel. In its exceptions upon appeal the United States did not contend that the question of the effect of the Treaty upon the validity of the seizure had not been properly raised, but contended that the Court had erroneously decided the question of such effect (R. 91, 92, 93, 96). The case, therefore, went to the Circuit Court of Appeals upon the question of the construction of the statute and the Treaty, no question being raised but that the issue had been properly presented by the pleadings. The Circuit Court of Appeals held that the seizure at the place as found by the District Court was valid under the Tariff Act, which was in no way modified by the Treaty.

On such a record the Government now raises for the first time the contention that there is "serious doubt" whether the question of the effect of the Treaty is presented by the record. It is suggested that the question of the validity of the seizure should have been raised by a preliminary and special plea to the jurisdiction, and that the point was waived by the filing of an an-

swer upon the merits, even though the point was raised in such answer.

We submit:

(1) That there is no basis whatever, either in authority or in practice, for the suggestion that in a proceeding *in rem* in admiralty for the forfeiture of a foreign vessel, the failure to file a separate and special plea to the jurisdiction of the Court is fatal to the consideration of the question of the validity of the seizure of the vessel, when raised *in limine* in the answer and the exceptions.

(2) Whatever may be the better practice, the Government is not now in a position to contend that the issue is not presented on this record—"it being clear that there is no jurisdictional defect in the pleadings."

Few questions are more troublesome than those relating to the pleading of jurisdictional questions. Whether such a question has been properly raised in the record has been made to turn not only upon the nature of the question, but upon the character of the Court, the status of the party raising it, and the time and circumstance of the pleading.

We do not believe that determination of this case will involve any question in this vexing field relating to the proper pleading of objections to the jurisdiction of the Court, we do not feel that the issue raised in reality related to the jurisdiction of the Court. *Rather the question of the validity of the seizure related to the authority of the administrative officers to have made the seizure at the place they did* (*Crowell* v. *Benson*, 285 U. S. 76; L. Ed. Advance Opinions, p. 369, note 17). Thus the question raised by the locality of the seizure was one of the merits of the cause—whether the penalties could be lawfully imposed; whether the statute had been violated. The question thus pre-

sented was determined by the Court in the exercise of its jurisdiction *in rem* over a vessel within its possessions and depended upon the application of the statute and Treaty. If this be true, then indisputably the question under the Treaty was properly raised as a defense in the answer and exceptions.

But if the question arising under the Treaty did go to the jurisdiction of the Court, it must have related either to its jurisdiction over the parties or over the subject-matter. It has frequently been said that objections to the jurisdiction of a Court over the parties may be waived (*Ford* v. *United States*, 273 U. S. 593, 606), but that questions relating to the jurisdiction of courts over the subject-matter may be raised at any time, since such jurisdiction cannot be conferred by consent of the parties. *Gainesville* v. *Brown-Crummer Co.*, 277 U. S. 54, 59; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 13, 18; *Mansfield R. Co.* v. *Swan*, 111 U. S. 379, 382-384.

This being a proceeding *in rem*, this question relating to the construction of the Treaty, if treated as going to the jurisdiction of the Court, cannot be regarded as an objection to the jurisdiction over the parties. The Court had jurisdiction over the vessel, and at the very least had jurisdiction to determine its own jurisdiction. Therefore, if the question goes to the jurisdiction of the Court at all, it is to its jurisdiction over the subject-matter—an objection which can not be waived and may be raised at any time. Moreover, it is arguable that, since an appeal in admiralty is a trial *de novo*, the question under the Treaty—whatever its nature—might have been raised for the first time in Circuit Court of Appeals; *and it is not denied that in that Court the issue under the Treaty was regarded as the controlling point in the case.*

Nor is this case to be confused with those which hold that a seizure of a domestic vessel in foreign waters is at most a trespass which does not raise any question militating against the jurisdiction of the proper Federal Court on a subsequent valid seizure of the vessel by civil authorities. *The Richmond,* 9 Cranch. 102; *The Merino,* 9 Wheat. 391, 402. Here the question relates to the lawfulness of the imposition of penalties upon a *foreign* vessel under the Tariff Act, and turns upon whether seizure of the vessel at a particular locality upon the high seas was a violation of our Treaty with Great Britain.

But whatever be the character of the question raised under the Treaty—whether it be regarded as going to the jurisdiction of the Court or not—we contend that on the record it was raised in a manner which is timely and proper under the *admiralty* practice. We submit that such of the cases cited by the Government as are in point support our view, and that from the following review of all the cases cited by the Government it will be found that the "serious doubts" of the Government are engendered by the assumption—*not founded upon authority*—that the strict common law rule relating to the order of pleadings, whereby pleas in abatement must precede pleas to the merits and are waived when the latter are filed, is applicable to proceedings *in rem* in admiralty.

Shepard v. *Graves,* 14 How. 504, 510, cited by the Government, is an example of the application of the strict rule of pleading. But that case was at common law. It has no place in admiralty where, as recognized in another case cited by the Government (*The Merino,* 9 Wheat. 391, 402), the technical niceties of the common law are not regarded. It is true that in *The Merino, supra,* an objection of claimants of ves-

sels in proceedings in admiralty *in rem*, to the effect that process had not been issued, was held to be without merit. But even if this ruling be regarded as proceeding upon the ground that the right to process was waived by the filing of appearances and asserting of claims, rather than upon the more valid ground that no process in the usual sense is required in proceeding *in rem*, the case is not here in point, for petitioner does not demand the service of process and makes no objection to the jurisdiction of the Court to determine the issue but to the validity of the imposition of the penalties and the authority of the administrative officers to have made the seizures.

The Richmond, 9 Cranch. 102, merely holds that the seizure of an American vessel by the Federal forces within the territorial jurisdiction of another power is at most a trespass against that other power which does not militate against the jurisdiction of the proper U. S. District Court on a valid subsequent seizure of the vessel by civil authorities. As already stated, no such question is presented here. The question here is whether the vessel can be subjected to penalties under the Tariff Act since it is a foreign vessel seized outside of territorial waters and at a place not within the zone laid down by our Treaty with Great Britain. In so far as *The Merino, supra* (9 Wheat. 391-402), involved the same point as *The Richmond* (9 Cranch. 102), it is distinguishable upon the same grounds.

In re Johnson, 167 U. S. 120, 126, involved a question of jurisdiction over the person under the criminal statutes peculiar to the Indian Territory. It applied the same theory in a different field, which was applied in *The Richmond, supra*. It did not involve, nor discuss, the point of pleading which the Government makes in this case.

Dodge v. *United States*, 272 U. S. 530, held that the seizure of a motor boat by a person not authorized by law, could be adopted by the United States and thereupon forfeiture proceeding would be had. The case discussed no question of pleading and is not in point here. The objection here is not merely to the status of the person who seized the vessel, but relates to a claimed immunity from seizure at all, at the locality and under the circumstances.

In *Ford* v. *United States*, 273 U. S. 593, 606, persons were tried for conspiracy to violate the National Prohibition Act and the Tariff Act. The trial and conviction resulted largely from the seizure of a British vessel. There was conflicting evidence as to whether the place of the seizure was within the zone of the high seas prescribed by our Treaty of 1924 with Great Britain. On the question of the admission in evidence of the ship and her cargo the District Court determined without the aid of the jury that the place of the seizure was within such zone and, therefore, the seizure was lawful. It was contended in this Court that the issue as to the place of the seizure should have been submitted to the jury upon the general issue. This Court said:

> "The issue whether the ship was seized within the prescribed limit did not affect the question of the defendants' guilt or innocence. It only affected the right of the court to hold their persons for trial. It was necessarily preliminary to that trial. The proper way of raising the issue of fact of the place of seizure was by a plea to the jurisdiction. A plea to the jurisdiction must precede the plea of not guilty. Such a plea was not filed. The effect of the failure to file it was to waive the question of the jurisdiction of the persons of defendants."

The case is merely another illustration of the rule that jurisdiction of the Court over the parties may be obtained by consent and that objections to the exercise of such jurisdiction may be waived. The case was not in admiralty and contains no rule, express or implied, on the question whether the objections raised as a defense in this case were proper matters to be raised in answer and exceptions or not.

The Underwriter, 13 F. (2d) 433, 434 (C. C. A. 2d), is an authority for, rather than against, our view. There the seizure was of an American vessel upon the high seas. In proceeding for her forfeiture, the question of the validity of the seizure was raised by exceptions of the claimant, just as it was in this case. The Circuit Court of Appeals, Second Circuit, did not question that the point was well pleaded, but it proceeded to determine that the search and seizure of a domestic vessel was authorized.

The claimant in the above case petitioned this Court for a review and the petition was granted and is reported under the title of *Maul* v. *United States,* 274 U. S. 501, 531, this Court holding that the officers of the Coast Guard had authority to seize a domestic vessel upon the high seas beyond the twelve-mile limit, but implying that they had no authority to board and seize foreign vessels except as provided for in the Treaty between Great Britain and the United States.

The Abby, Fed. Cas. No. 14, was an information for forfeiture of a vessel for violation of the licensing laws. It was objected that the District Court of Massachusetts, where the information was brought, was without jurisdiction since the seizure was within the judicial district of Maine, and a statute provided that seizure within a district must be followed by forfeiture proceedings in the District Court of that district.

Justice Story found on the facts that the seizure was upon the high seas and that the District Court of Massachusetts had jurisdiction under another statute providing that in case of seizure upon the high seas forfeiture might be had in any district to which the vessel was brought. Having thus disposed of the question of the jurisdiction of the Court, the Justice also remarked that the point had been waived. But it does not appear that in that case the claimant had pleaded the point *in limine* in exceptions and answer, as was done here. The Justice held that the claimant was estopped to challenge the Court's jurisdiction because he had affirmatively recognized that jurisdiction by applying to the Court for, and receiving, bail of the vessel. Moreover, that was a clear case of a challenge to the jurisdiction of the Court, whereas, as has been indicated herein, the instant question would not appear to be a challenge to the jurisdiction of the Court.

It is true that in a case arising upon a libel for the forfeiture in admiralty the Circuit Court of Appeals, Fifth Circuit, said:

> "The objection to the authority of the Coast Guard to make the seizure is purely technical and without merit. After a ship is brought into the custody of the marshal through proper admiralty process, any irregularity in the initial seizure is immaterial and is waived by filing a claim or answer. *The Merino,* 9 Wheat. 391, 6 L. Ed. 118; *The Richmond,* 9 Cranch. 102, 3 L. Ed. 670; *In re Johnson,* 167 U. S. 120, 17 S. Ct. 735, 42 L. Ed. 103."

It is apparent from the cases cited that the Circuit Court of Appeals was merely applying to an American vessel in that case the rule of *The Richmond, supra,* that seizure of an American vessel by the United

States beyond the territorial waters of the United States raises no question, without more, going to the jurisdiction of the Court in which forfeiture proceedings based upon subsequent civil seizure are instituted. If, as seems unlikely, the above statement of the Circuit Court of Appeals is intended to mean that as a matter of admiralty practice objections to the validity of seizures may not be made in answers and exceptions, then the decision is not supported by the cases it cites (as has been seen) or by later cases.

To recapitulate:

There was clearly no express waiver in the Courts below of the precise point which it is now sought to have reviewed in this Court. The point was treated by both Courts below as having been properly put in issue, and was decided.

There is no case holding that the question of the validity of the seizure of a foreign ship, in view of the Treaty, may not be properly raised under the admiralty practice by answer and exceptions.

If considered as a question going to the jurisdiction of the Court, it is not a question of jurisdiction over the person for the proceeding is *in rem;* it must, therefore, be an objection to the jurisdiction of the Court over the subject-matter, and, therefore, may be raised at any time.

The question is not really of the jurisdiction of the Court, but of the authority of the administrative officers, and its determination, which turns upon the construction of the Treaty and application of the statutes, was within the jurisdiction of the Court and the question was properly put in issue in the answer and exceptions.

Assuming, but not admitting, that it would have been better pleading to challenge the validity of the seizure

by a separate special plea to the jurisdiction, the government is bound by the theory upon which the case was tried in the trial court and heard in the Circuit Court of Appeals, and is estopped to contend that the question presented to this Court was not properly in issue below. Petitioner's objection to the validity of the seizure raised by the answers and exceptions were not subjected to exception or objection by the government at trial; both parties introduced evidence upon the issue and the opinions of both trial court and Circuit Court of Appeals proceeded upon the theory that the controlling question was whether the seizure was lawful in view of the Treaty stipulations. The language of Mr. Justice Van Devanter, speaking for the Court in *San Juan Light Co.* v. *Requena*, 224 U. S. 89, 96, 97, is strikingly in point:

> "The trial proceeded upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party, without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of a variance. *Effect must, therefore, be given to the well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review.*"

This is a well-settled and generally accepted rule. See *Milton* v. *Pensacola Bank & Trust Co.*, 190 F. 126, 136 (C. C. A. 6th); *Brockenborough* v. *Champion Fibre Co.*, 176 F. 840, 842 (C. C. A. 4th); *Sutherland* v. *Sutherland*, 102 Ia. 535; *Tarbul* v. *Royal Exc. Shipping Co.*,

110 N. Y. 170; *Morrisson* v. *Atkinson*, 16 Okla. 571; *Knoop* v. *Kelsey*, 102 Mo. 291, 10 R. C. L. 701, sec. 281.

Respectfully submitted,

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APPENDIX

Statutory Basis for Review

The statute under which review is sought is Section 240 (a), Judicial Code, as amended by the Act of February 13, 1925, 43 stat. 936, 938, 28 U. S. C. 347.

Reasons Relied Upon for the Allowance of the Writ

The Circuit Court of Appeals has rendered a decision in conflict with decisions of other Circuit Courts and District Courts on the application of Sections 581 and 584 of the Tariff Act of 1922 and 1930 and of the effect of the Treaty between the United States and Great Britain, which became effective May 22, 1924.

The Circuit Court of Appeals has decided an important question of International and Federal law which has not been, but should be decided and settled by this Court.

The Treaty with Great Britain modified, limited, abrogated and rescinded all inconsistent statutes and parts thereof (Sections 581 and 584 of the Tariff Act, particularly), regarding the search and seizure of

British vessels beyond the 3-mile limit except as provided for by the terms of the Treaty.

An examination of the debates in Congress at the time of the passage of Sections 581 and 584 of the Tariff Act of 1922 discloses that on July 6, 1922, Senator Sterling proposed the following amendment to this Section:

> "Officers of the Customs, the Coast Guard, the Treasury Department, or other officers whose duty it is to enforce the National Prohibition Act, may go on board any vessel, at any place in the United States or within six marine leagues of the coast of the United States, and hail, stop and board such vessel in the enforcement of the laws prohibiting, regulating, taxing or relating to the liquor traffic.
>
> The provision of the National Prohibition Act and other laws relating to intoxicating liquors shall be in full force and effect within six marine leagues of the Coast of the United States and shall be enforced by such officers who shall have all of the authority conferred by this section and by Section 3067 of the Revised Statutes (Act of March 2, 1799, Chapter 22, First Statutes at Large, page 668), upon Customs Officers in the enforcement of the Customs Laws."

On August 19, 1922, Senator Sterling filed the following amendment modifying the original amendment of July 6, 1922:

> "Officers of the customs, the Coast Guard, the Treasury Department, or other officers whose duty it is to enforce the National Prohibition Act, may go on board any vessel, at any place in the United States or within 4 marine leagues of the coast of the United States, and hail, stop, and board such

vessel in the enforcement of the laws prohibiting, regulating, taxing, or relating to the liquor traffic; and such officers shall have all of the authority conferred by this section and by Section 3067 of the Revised Statutes (Act of March 2, 1799, ch. 22, 1 Stat. L. 668) upon customs officers in the enforcement of the customs laws."

He carefully explained to Congress that he thought Congress had the right to extend the 3-mile limit, but at the risk of international complications which might subject us to claims for damages because of interference with vessels of other nations. He said further:

"Let me say to the Senator that I hope arrangements will be made with other nations covering that matter. I think the Secretary of State is in entire good faith endeavoring to make such an arrangement."

Mr. Sheppard (co-author of dry law):

"I trust the Secretary of State will be successful. It is a matter, however, which we cannot allow to rest until permanently and satisfactorily settled."

Mr. Sterling:

"I agree with the Senator from Texas." (See Cong. Rec., Vol. 62, Pt. 2, 67th Congress, 2nd Sess., p. 11593.)

It seems clear that the reason for the passage of this Section was to cover the period of the pending negotiations for a Treaty with Great Britain to allow seizure of British rum-smuggling ships.

Both Great Britain and the United States have strictly maintained that three miles from the coast marks the limit of territorial waters.

Prior to and subsequent to the passage of Sections 581 and 584 of the Tariff Act, the Government seized a number of British vessels under circumstances where the boats had never directly or by their small boats or crew come within the three-mile limit. The British Government vigorously protested these seizures. On June 26, 1922, Mr. Hughes, Secretary of State, proposed to Great Britain that a treaty be entered into giving to the authorities of each nation the right to search vessels of the other within twelve miles from the shore. This proposal was rejected.

On November 10, 1922, after the enactment of Section 581 of the Tariff Act of 1922, the Treasury Department ordered the release of all foreign vessels seized outside of the 3-mile limit where there was no evidence of communication with shore by means of the vessels' own boats.

This practice, so far as can be learned, continued in accordance with the above order until ratification of the Treaty with Great Britain on May 22, 1924.

Great Britain had never agreed to the provisions of Section 581 and firmly and rigidly insisted that three marine miles extending from the coast line outwards and measured from the low-water mark constitute the proper limits of territorial waters.

The Treaty of May 22, 1924, was expressly stated therein to have been for the purpose of "avoiding any difficulties which might arise" between the United States and Great Britain "in connection with laws in force in the United States on the subject of alcoholic beverages." There already had been difficulties as the result of seizures of British vessels. The United States

had seized vessels beyond the 3-mile limit which had neither themselves nor by their own boats come within territorial waters. Great Britain had resisted the exercise of any such jurisdiction over such vessels.

The Treaty defined the jurisdiction which the United States might exercise beyond the 3-mile limit. That the rights conferred were exclusive and strictly limited is shown not only by the language conferring them but by Article I of the Treaty. The pre-existing rules of international law as maintained by the two nations are to remain unchanged except as specifically provided for by the Treaty.

Sections 581 and 584 of the Tariff Act of 1922, reenacted in 1930, apply only where the seizure is strictly within the provisions of the Treaty. Only the specific jurisdiction mentioned in the Treaty was conferred upon the United States and all other was prohibited. *The Frances Louise,* 1 Fed. (2d) 1004.

In *The Sagatind,* 11 Fed. (2d) 673, the Circuit Court of Appeals (2nd Circuit) said:

> "We agree with *The Frances Louise,* 1 Fed. (2d) 1004, that these Treaties (with Great Britain and Norway) *exclusively* determine the status of vessels of appropriate nationality lying off the shore of the United States." (Italics ours.)

See also: *The Sagatind,* 4 Fed. (2d) 928, 930; *The Marjorie E. Bachman,* 4 Fed. (2d) 405, 408; *Henning* v. *United States,* 13 Fed. (2d) 74, 75 (C. C. A. 5th).

The Coast Guard officers were without authority to seize the "Mazel Tov" and that such seizure at the place made was a violation of the Treaty with Great Britain, which limited the jurisdiction of the United States over vessels of Great Britain except as specifically provided for by the Treaty, and the imposition

of any penalties in this case would be unlawful, in view of the circumstances of the seizure.

Assignment of Errors

1. The Circuit Court of Appeals erred in holding that the Treaty with Great Britain of May 22, 1924, relative to smuggling of intoxicating liquors did not limit search and seizure provisions of the Tariff Acts of 1922 and 1930 to British vessels within one hour's travel from the coast of the United States.

2. The Circuit Court of Appeals erred in holding that the facts specifically found by the District Court fulfill all the requirements for an adjudication of the forfeited liquors under Section 584.

3. The Circuit Court of Appeals erred in holding that all of the facts essential to the assessment of the penalty of $14,286.18 against the Master under Section 584 were found by the Court below and its collection out of the vessel under Section 594 could be lawfully imposed.

4. The Circuit Court of Appeals erred in holding that the Treaty of 1924 did not repeal, modify or abrogate the clause fixing the four league zone in all customs revenue laws, including Section 581 of the Tariff Act.

5. The Circuit Court of Appeals erred in its findings of law.

6. The Circuit Court of Appeals erred in vacating the decrees of the District Court.

FILE COPY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 82

FRANK COOK,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

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INDEX.

PAGE

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Statutes and Treaty Involved 2
Statement of Facts 3
Specification of Errors 6
Summary of Argument 7
Argument: 8

1. The United States has always strictly maintained that three miles from the coast marks the limit of territorial waters 8
2. Prior to the Treaty of 1924 and subsequent to the passage of Section 581 of the Tariff Act of 1922 Great Britain refused to consent to searches and seizures within twelve miles from the coast 12
3. The protests of Great Britain against seizures of British vessels by the United States beyond the three-mile limit after the enactment of the Eighteenth Amendment was one of the principal reasons for the Treaty of 1924 14
4. Section 581 of the Tariff Act of 1922 was passed by Congress at the risk of international complications and for the purpose of searching and seizing British and other foreign liquor vessels pending negotiations of rum-smuggling treaties 17
5. The Treaty of May 22, 1924, dealt completely with the seizure of British vessels beyond territorial waters, that is, beyond the three-mile limit 27
6. Congress did not intend to alter the status and effect of the Treaty of 1924 when it reenacted in 1930 Sections 581 and 584 of the Tariff Act of 1922, and the Treaty amounts to a limitation of these sections 29

PAGE

7. The libels under Section 584 should not be sustained in view of the locality of the seizure, being at a point beyond that provided by the Treaty 32
8. Question properly raised below: The controlling question in the District Court and the Court of Appeals was whether the seizure was lawful in view of Treaty provisions and the Government should not be permitted to change the theory of the case in this Court on review 35

Conclusion 42
Appendix 43

Table of Cases.

Brockenborough v. Champion Fibre Co., 176 Fed. 840, 842 (C. C. A. 4th) 41
Charlton v. Kelly, 229 U. S. 447, 463 ..... 30, 31
Church v. Hubbart, 2 Cranch 18, 2 L. ed. 249 ..... 10, 12
Crowell v. Benson, 285 U. S. 76, L. ed. adv. op. 369, note 17 37
Cunard S. S. Co. v. Mellon, 262 U. S. 100, 122..9, 20, 34
Davis v. Concordia, 9 Howe 280, 13 L. ed. 208 31
Fong Yue Ting, 149 U. S. 698 30
Ford v. United States, 273 U. S. 593 ..... 24, 25, 34, 38
Gainesville v. Brown-Crummer Co., 277 U. S. 54, 59 38
Headmoney Cases, 112 U. S. 580, 599 30
Horner v. United States, 143 U. S. 570 30
Hudson v. Guestier, 6 Cr. 281, 3 L. ed. 224 10
Johnson v. Browne, 205 U. S. 309 30
Jones v. Meehan, 175 U. S. 1, 32, 20 S. Ct. 1, 44 L. ed. 49 21
Knoop v. Kelsey, 102 Mo. 291, 10 R. C. L. 701, Sec. 281 41
Mansfield R. Co. v. Swan, 111 U. S. 379, 383-384 38
Milton v. Pensacola Bank & Trust Co., 190 Fed. 126, 136 (C. C. A. 6th) 41
Morrisson v. Atkinson, 16 Okla. 571 41
Rose v. Himely, 4 Cr. 241, 2 L. ed. 608 10

PAGE

San Juan Light Co. v. Requena, 224 U. S. 89, 96, 97.. 40
Stratton v. St. Louis S. W. Ry., 282 U. S. 10, 13, 18.. 38
Sullivan v. Kidd, 254 U. S. 433, 440, 41 Sup. Ct. 158, 65 L. ed. 344 23
Sutherland v. Sutherland, 102 Ia. 535 41
Tarbul v. Royal Exc. Shipping Co., 110 N. Y. 170.... 41
Texas & Pac. Ry. Co. v. Abeline Cotton Oil Co., 204 U. S. 427, 436, 437, 27 S. Ct. 350, 51 L. ed. 553, 9 Ann. Cas. 1075 21
The Appollon, 9 Wheat. 362, 371, 6 L. ed. 111 10
The Chinese Exclusion Case, 130 U. S. 581 30
The Coquitlam (1893) 57 Fed. 706 9
The Frances Louise (D. C.) 1 F. (2d) 1004, 19, 21, 24, 34
The George and Earl (D. C. East. Dist.) 30 F. (2d) 441 34
The Grace and Ruby, 283 Fed. 475 ..... 11, 12
The Henry L. Marshall, 286 Fed. 260 (Oct. 1922) aff. 292 Fed. 486 12
The Marjorie E. Bachman (D. C. Mass.) 4 F. (2d) 405, 408 22
The Merino, 9 Wheat. 391, 402 39
The Quadra, 10 F. (2d) 339, 346 24
The Richmond, 9 Cranch 102 39
The Sagatind, 11 F. (2d) 673 ..... 21, 24
The Sylvia II, 28 F. (2d) 215 (Dist. Ct. Mass.) 33
United Shoe Machinery Co. v. Duplessis Shoe Machinery Co., 115 Fed. 842 30
United States v. Lee Yen Tai, 185 U. S. 213 30
United States v. Maul, 274 U. S. 501 ..... 25, 34
United States v. Schooner Peggy, 1 Cr. 103 30
Whitney v. Robertson, 124 U. S. 190 ..... 30, 31

Statutes, Textbooks, Etc.

Act of March 2, 1799, ch. 22, 1 Stat. 627 ..... 9, 28
American Journal International Law, Vol. 18, No. 2, p. 229 ..... 12, 18
Congressional Record, Vol. 62, Pt. 2, 67th Congress, 2nd Session, p. 11593 29

PAGE

Congressional Record, Vol. 65, Pt. 7, 68th Congress, 1st Session, p. 6723 24
Department of State Press, released Oct. 16, 1922.. 13
Foreign Relations 1875, 1, 649, 650 8
1 Hyde 418, note 5 10
Jessup, Law of Territoial Waters, p. 254 14
1 Moore's Digest 278, 731, 908, 922 ..... 8, 10
5 Moore's Digest 370 31
Notes to Great Britain VII, 185 9
Judicial Code, Sec. 240-A 2
Letter from Fish, Secretary of State, to Sir Edward Thornton, British Minister, Jan. 22, 1875 8
Letter from Mellon, Secretary of Treasury, to Collector of Customs, New York, Nov. 9, 1922....15-16
M. S. Records, State Department, released Feb. 20, 1927 ..... 11, 13, 16
M. S. Records, State Department (July 19, 1923).... 25
Revised Statutes (Act of March 2, 1799, ch. 22, 1st Stat. at Large, p. 668) 28
Tariff Act of 1922, Sec. 581 (42 Stat. 858), 2, 6, 7, 10, 27, 28, App.
Tariff Act of 1930, Sec. 584, 585..2, 3, 4, 5, 6, 7, 29, App.
Treaty between United States and Great Britain of May 22, 1924 (43 Stat. 1761), 2, 5, 6, 7, 17, 18, 19, 29, App.
Wheaton, International Law, Dana's Ed. 1866, p. 259, note 108 10

In The

Supreme Court of the United States

October Term, 1932.

No. 82

Frank Cook,
Petitioner,

v.

The United States of America,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIRST CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court (R. 62) is reported in 51 F. (2d) 292. That of the Circuit Court of Appeals (R. 95) is reported in 56 F. (2d) 921.

Jurisdiction.

The final decree of the Circuit Court of Appeals (R. 106) was entered March 18, 1932. The petition for a writ of certiorari was filed May 16, 1932. The writ of certiorari was granted October 10, 1932.

The jurisdiction of this Court rests upon Section 240-A of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether a seizure of a British vessel beyond the three-mile limit at a point 11½ miles from the coast of the United States but at a locality not in conformity with the provisions of the Treaty between the United States and Great Britain, dated May 22, 1924, is valid.

2. Whether the Treaty between the United States and Great Britain of 1924 limited, modified or abrogated the search and seizure provisions of the Tariff Acts of 1922 and 1930.

3. Whether libels in admiralty under Section 584 of the Tariff Act of 1930 can be sustained against a British vessel and its cargo when the seizure of the vessel was made by officers of the Coast Guard 11½ miles from the coast of the United States but at a greater distance than the vessel could traverse in one hour, which seizure is not in conformity with the Treaty between the United States and Great Britain dated May 22, 1924.

Statutes and Treaty Involved.

The pertinent provisions of the Tariff Acts of 1922 and 1930 and of the Treaty between the United States and Great Britain of May 22, 1924, are printed in the Appendix (*infra* pp. 43-47).

Statement of Facts.

Briefly, the facts are that on the evening of November 1, 1930, the Mazel Tov was boarded by officers of the United States Destroyer Tucker, 11½ miles off the coast of Massachusetts. The vessel at the time was under way, but upon being signaled by the Coast Guard promptly stopped (R. 39).

Her sole cargo, outside of sea stores, consisted of 403 sacks of intoxicating liquors, which had been cleared at St. Pierre on October 16th. There was no evidence that the Mazel Tov had either been in communication with the American shore or had unladen any part of her cargo (R. 43, 33).

Upon request of the boarding officer, the Master of the Mazel Tov produced a manifest, her certificate of British registry, clearance papers and crew list. The manifest, written in French, shows the port of departure to have been St. Pierre and gives the destination of the vessel as "Nassau, et la haute mer" (R. 22-24).

Following inspection by the boarding crew, the Mazel Tov was taken in tow by the Coast Guard vessel at a point approximately 13 miles from the nearest point of land, the vessel having drifted some distance during the period of inspection, and ultimately given into the custody of the Collector of Port for the District of Rhode Island (R. 41).

These are two actions in admiralty which by stipulation of counsel and order of the Court were heard jointly, and for the purpose of appeal were consolidated. The first, a libel *in rem* against the British vessel Mazel Tov, for violation of Sections 584 and 585 of the Tariff Act of 1930, contained three counts alleging: (1) That the Master failed to produce a manifest; (2) that there was on board merchandise not

described in the manifest; (3) that the vessel arrived within the limits of a Collection District and attempted to depart therefrom without making entry (R. 1-5).

The second libel sought the forfeiture under Section 584 of the Tariff Act of 1930 of the cargo *ex* British Motor Screw Mazel Tov on the ground that there was found on board unmanifested cargo consigned to the Master of the vessel (R. 6-8).

The claimant filed answers and exceptions to both libels on December 2, 1930. The answers and exceptions raised *in limine* the contention that the seizure was unlawful and that the penalties and forfeitures could not lawfully be imposed in view of the place of the seizure (R. 12-16).

The Government in its first libel (R. 3) raised the question of the Treaty between the United States and Great Britain and sought collection of the penalties under Section 584 of the Tariff Act for alleged violation of the Treaty.

In relation to the destination and speed of the vessel, the District Judge in his opinion (R. 62) says:

> "The evidence indicates that the Master of the Mazel Tov did not intend to approach nearer than four leagues to our coast. The point of land from which the Mazel Tov is here found to have been eleven and one-half miles distant is a small island, "No Man's Land," lying some distance at sea off the island of Martha's Vineyard (R. 63).
>
> "The speed of the Mazel Tov under normal conditions was not in excess of ten knots. Her certificate of registration gives the speed as nine knots, which is not inconsistent with the size of the vessel and motors with which it is equipped" (R. 63).

No evidence was presented by the government which would suggest that these speeds were not substantially correct.

Upon hearing of the libels and answers, the District Judge dismissed both libels and, among others, made the following conclusions of law:

> "(a) The Court holds that under the provisions of Section 584 of the Tariff Act of 1930 the Master of the British Motor Screw Mazel Tov did not become liable to a penalty of $500 for not producing a manifest to the Coast Guard officer who demanded it and that the paper introduced by the claimant constituted a manifest within the meaning of Section 584 of the Tariff Act (R. 86).
>
> "(b) The Court holds that under the provisions of Section 584 of the Tariff Act of 1930 the Master of the British Motor Screw Mazel Tov did not become liable to a penalty of $14,286.18 for having on board said vessel merchandise not included or described in any manifest because the seizure was made beyond the three-mile limit and not in conformity with the Treaty entered into between the United States and Great Britain, promulgated May 22, 1924, 43 Stat. 1761" (R. 86-87).

In the matter of the cargo *ex* British Motor Screw Mazel Tov the Court found that under the provisions of Section 584 of the Tariff Act of 1930 the liquors were not forfeited to the United States because the seizure was made beyond the three-mile limit and beyond the distance from shore that the vessel could traverse in one hour's sailing time, and was not made in conformity with the Treaty entered into between Great Britain and the United States (R. 91).

The District Judge found the following facts:

> "(a) That the British Motor Screw Mazel Tov was seized at a point 11½ miles off the coast of Massachusetts.

"(b) That the Master produced a manifest when commanded to do so by an officer of the Coast Guard.

"(c) That the maximum speed of the British Motor Screw Mazel Tov at the time of seizure was between nine and ten knots an hour" (R. 85-86).

At the time of the hearing in the District Court, the Court treated the question of the effect of the Treaty as properly raised by the answers and exceptions and held that the vessel had been seized in violation of the British-American Treaty of May, 1924.

Appeal having been taken by the United States, the Circuit Court of Appeals for the First Circuit reversed in part the decree of the District Court and held that the seizure at the place as found by the District Court was valid under Section 581 of the Tariff Act of 1930 and that the British-American Treaty of 1924 in no way modified or abrogated the aforementioned Section of the Tariff Act; and the vessel was subject to having the penalties assessed against the Master under Section 584 collected out of vessel (R. 95).

Specification of Errors.

1. The Court of Appeals erred in holding that the seizure of a British vessel 11½ miles from the coast of the United States but at a greater distance than the vessel could traverse in one hour was a valid seizure (R. 103).

2. The Circuit Court of Appeals erred in holding that the Treaty with Great Britain of 1922 did not limit the search and seizure provisions of the Tariff Acts of 1922 and 1930 to British vessels within one hour's travel from the coast of the United States (R. 103).

3. The Court of Appeals erred in holding that libels could be sustained under Section 584 of the Tariff Act in view of the locality of the seizure, being at a point beyond that provided by the Treaty (R. 106).

Summary of Argument.

1. The United States has always strictly maintained that three miles from the coast marks the limit of territorial waters (P. 8).

2. Prior to the Treaty of 1924 and subsequent to the passage of Section 581 of the Tariff Act of 1922, Great Britain refused to consent to searches and seizures within twelve miles from the coast (P. 12).

3. The protests of Great Britain against seizures of British vessels by the United States beyond the three-mile limit after the enactment of the Eighteenth Amendment was one of the principal reasons for the Treaty of 1924 (P. 14).

4. The Treaty of May 22, 1924, dealt completely with the seizure of British vessels beyond territorial waters, that is, beyond the three-mile limit (P. 17).

5. Section 581 of the Tariff Act of 1922 was passed by Congress at the risk of international complications and for the purpose of searching and seizing British and other foreign liquor vessels pending negotiations of rum-smuggling treaties (P. 27).

6. Congress did not intend to alter the status and effect of the Treaty of 1924 when it re-enacted in 1930 sections 581 and 584 of the Tariff Act of 1922, and the Treaty amounts to a limitation of these sections (P. 29).

7. The libels under Section 584 should not be sustained in view of the locality of the seizure, being at a point beyond that provided by the Treaty (P. 32).

8. Question properly raised below: The controlling

question in the District Court and the Court of Appeals was whether the seizure was lawful in view of Treaty provisions and the Government should not be permitted to change the theory of the case in this Court on review (P. 35).

ARGUMENT.

I.

The United States Has Always Strictly Maintained That Three Miles From the Coast Marks the Limit of Territorial Waters.

Two principal questions are here presented: First, whether a seizure of a British vessel eleven and one-half miles from the coast of the United States but at a greater distance than she could traverse in one hour, as provided for by the Treaty between the United States and Great Britain, is valid; and second, whether libels for penalties may be sustained as a result of such a seizure.

One necessarily includes the other. The petitioner's contentions are that the seizure was unlawful, beyond the territorial waters of the United States as well as beyond a point permitted by the Treaty between the United States and Great Britain; and that the penalties cannot be lawfully imposed. Accordingly, the vessel and cargo should be released.

On January 22, 1875, Mr. Fish, Secretary of State, wrote to Sir Edward Thornton, British Minister:

> "We have always understood and asserted that, pursuant to public law, no nation can rightfully claim jurisdiction at sea beyond a marine league from its coast." Foreign Relations 1875, 1, 649-650; 1 Moore's Digest of International Law 731;

Notes to Great Britain VII, 185; Cunard S. S. Co. v. Mellon, 262 U. S. 100, 122.

Beyond the limit of the marine league lie the high seas over which no nation can exercise jurisdiction. A ship or vessel upon the high seas is subject solely to the jurisdiction of the nation whose flag she flies. No other nation, apart from Treaty, may lawfully interfere with her.

Extraterritorial acts are founded upon acquiescence rather than upon the right to exercise jurisdiction beyond the three-mile limit.

Under the Act of March 2, 1799, ch. 22, 1 Stat. 627, this Government has never claimed jurisdiction beyond the three-mile limit in exercising the authority to board within four leagues of our coast. The Secretary of State explained to Sir Edward Thornton, British Minister, January 22, 1875, that such boarding is made upon the implied consent of vessels voluntarily coming to an American port since "no vessel is boarded, if boarded at all, except such a one as, upon being hailed may have answered that she was bound for the United States."

In *The Coquitlam* (1893), 57 Fed. 706, one of the early cases of seizure beyond the three-mile limit but within four leagues from the coast, the District Court forfeited the vessel. The Circuit Court of Appeals (77 Fed. 44) reversed the decree and held that the sealing vessel was not bound for the United States and that the unloading was not unlawful. The American and British Claims Arbitration Tribunal awarded damages against the United States for the seizure of The Coquitlam in the amount of $48,000.

An examination of the reported cases discloses no instance of a seizure of a vessel hovering along our coast, which had never come directly or by means of its

own boats within the territorial waters of the United States, with the exception of certain sealing vessels, for which seizures the United States was compelled to pay damages, until after the passage of the Prohibition Act in 1919.

Church v. *Hubbart*, 2 Cranch 18, 2 L. Ed. 249.
Rose v. *Himely*, 4 Cranch 241, 2 L. Ed. 608.
Hudson v. *Guestier*, 6 Cranch 281, 3 L. Ed. 224.
Wheaton International Law, Dana's Ed. 1866, p. 259, note 108.
The Appollon, 9 Wheat. 362, 371; 6 L. Ed. 111.
1 *Moore's Digest*, 278.
1 *Hyde*, 418, note 5.
1 *Moore*, 908.
1 *Moore*, 922.

Thus, for more than one hundred years, this Government in enforcing the Revenue Acts had not seized foreign vessels beyond the three-mile limit when these vessels had not come within the three-mile limit directly or through their own boats. In 1921-1922 there was a departure by this Government which resulted in the seizure of foreign vessels beyond the three-mile limit, which had communicated with the shore by means of boats not their own. The British Government protested and protested earnestly. They rejected a proposal to allow unlimited search within twelve miles from the coast.

On September 21, 1922, the "Tariff Act of 1922" was passed, 42 Stat. 858. This Act, among other things, permitted and authorized the boarding, searching and seizing of "any ship or vessel" within four leagues, or twelve miles, from the coast of the United States, modifying the legislative principle which had been on the statute books for one hundred and twenty-

three years. The Tariff Act of that year made the former provisions applicable to all ships in an effort to exercise jurisdiction over foreign vessels beyond the three-mile limit contrary to its own position on the question of territorial jurisdiction.

In the same month, the United States District Court in Massachusetts decided *The Grace and Ruby Case*, 283 Fed. 475. The vessel being partly owned by an American, the case was heard solely upon the question of jurisdiction. The exceptions were overruled and District Judge Morton said:

> "The act of unlading, although begun beyond the three-mile limit, continued until the liquor was landed, and the schooner was actively assisting in it by means of her small boat and three of her crew who were on the boat for that purpose."

The British Government was not prepared to acquiesce and on December 30, 1922, the British Ambassador addressed a note to the Secretary of State, in part as follows:

> "In order to avoid the possibility of any misunderstanding, I am desired by my Government to make it clear that His Majesty's Government is unable to acquiesce in what they understand to be the ruling of the United States Government, namely, that foreign vessels may be seized outside of the three-mile limit, if it can be shown that they have established contact with the shore for illegal purposes by means of their own small boats. My Government must reserve their right to lodge a protest in any individual case in which action may be taken by the United States under this ruling."
>
> M. S. Records, Department of State, released February 20, 1927.

The Henry L. Marshall, 286 Fed. 260 (Oct., 1922), affirmed 292 Fed. 486, following the principle of *The Grace and Ruby* and *Church* v. *Hubbart, supra.* The Henry L. Marshall, an alleged British vessel, was seized in the summer of 1921 nine or ten miles from the coast of the United States. She had unloaded liquor into motor boats not her own, which had taken it within the three-mile limit. *No boat belonging to the Marshall and no member of her crew came within the three-mile limit.* The vessel was forfeited.

The British Government protested against this seizure. The protest was finally withdrawn upon the ground that the vessel was not of *bona fide* British registry, but in withdrawing the protest the British Government did not acquiesce in the principle of the ruling. See Statement of Honorable Charles E. Hughes, January 23, 1924, American Journal International Law, Vol. 18, No. 2, p. 229.

II.

Prior to the Treaty of 1924 and Subsequent to the Passage of Section 581 of the Tariff Act of 1922 Great Britain Refused to Consent to Searches and Seizures Within Twelve Miles from the Coast.

The United States realized after the Prohibition laws went into effect that international complications would necessarily arise in connection with their enforcement. While maintaining the three-mile limit as the boundary of territorial waters, they were attempting to assert the right of extra-territorial seizures that resulted in protests from foreign governments.

With this view in mind, on June 26, 1922, the Secretary of State addressed a note to the British Ambassador, inquiring whether the British Government

would be disposed to conclude "a Treaty for the purpose of checking illegal practices in question. Such a Treaty might contain the reciprocal right of each government to exercise a right of search of vessels of the other nation beyond the three-mile limit of territorial waters to the extent of twelve miles from the shore."

The British Government replied through its Ambassador in Washington on October 13, 1922, stating, among other things, that they could not acquiesce in the abandonment of a principle by extending the limit of territorial waters. The proposed Treaty was accordingly rejected.

Department of State Press, Released October 16, 1922.

Negotiations were again renewed on June 12, 1923, proposing again the right to search and seize within twelve miles. On June 14, 1923, the British Government again rejected the proposed Treaty. On July 19, 1923, the Secretary of State addressed a note in part as follows:

"The proposed special agreement would bear only upon those vessels which come within twelve miles, but hover off the three-mile limit for the purpose of aiding in the smuggling of intoxicating liquors or other prohibited articles into the territory of the United States."

M. S. Records, Department of State Press Release, Feb. 20, 1927.

The following seizures by the United States and the subsequent release of the vessels indicates the position of the United States prior to the Treaty, nothwithstanding the authority conferred by Section 581.

III.

The Protests of Great Britain Against Seizures of British Vessels by the United States Beyond the Three-Mile Limit After the Enactment of the Eighteenth Amendment Was One of the Principal Reasons for the Treaty of 1924.

After the seizure of the Marshall, this Government seized a considerable number of British vessels under the same circumstances; that is, vessels which had never directly or by their small boats or crew come within the three-mile limit. The British Government vigorously protested these seizures.

The records of the State Department reveal the following information regarding seizures of foreign vessels; some of them are understood to have been released under the order of the Attorney General.

The British schooner C. H. Anderson, seized February 23, 1925, eleven miles off Montauk Point, Long Island, released for lack of evidence of contact with shore; British schooner Kwasind, cleared from Nassau to Halifax with cargo of liquor, but found far off her course to her destination on a sand bar and rescued by a Coast Guard cutter, which took it to port. The British Government vigorously protested against subsequent proceeding and the ship was released.

According to press reports the following seizures were made: British sloop Buema and The Etta B, seized September 14, 1922, eight and four miles respectively from the coast; British ship Emerald, seized in October, 1922, eight miles from the shore, released after British protest; British schooner Grace and Edna seized eight miles off the Jersey coast, released October 31, 1922; British schooner Minnie E. Mintus, seized more than three miles off Galveston, Texas, January 6, 1924. Jessup Law of Territorial Waters, p. 254.

The British ship, Marion L. Mosher, was seized on July 27, 1923, between seven and eight miles off the American coast near Fire Island. According to the testimony offered in Court, the vessel had been within the twelve-mile limit for twenty-three days without making the required report to the Custom House. The vessel was further charged with unloading within the twelve-mile limit. While libels were pending in Court, the British Government was protesting against these seizures outside the three-mile limit. As a result, it was ordered by the Attorney General of the United States that the ship and its cargo be released upon giving of bond to proceed to its destination.

On November 10, 1922, the Treasury Department, upon request of the Department of State and the Department of Justice, published an order directing the release of all foreign vessels seized outside the three-mile limit where there was no evidence of communication with the shore by means of the vessel's own boat. The order is a follows:

"November 9, 1922,
The Collector of Customs,
New York, N. Y.

Sir:—

The Department is in receipt of your telegram of the 8th instant, relative to the seizure of the British auxiliary Schooner M. M. Gardner, on September 13, 1922.

It appears from your report that the seizure was made outside the three-mile limit, and that while the master admitted unlading part of the cargo beyond the three-mile limit there is no evidence that the vessel was communicating with the shore by means of her own boats or equipment.

Under these circumstances it is the desire of the Department of State and the Department of Jus-

tice that all foreign vessels so seized shall be released, and you will be governed accordingly. A report should be made to the Department in each instance.

Respectfully,

s/d A. W. MELLON,
Secretary."

According to the New York Times of November 11, 1922, about twenty vessels were released in accordance with the above order, reloaded with their cargoes and conveyed to the point of seizure. Section 581 of the Tariff Act of 1922 was in force at the time of the above order and it is reasonable to assume that the Treasury Department, Department of Justice and the State Department were cognizant of its provisions in respect to searches and seizures when the order of November 9, 1922, was issued.

On July 10, 1923, the British Ambassador at Washington addressed a note to the Secretary of State in part as follows:

> "Accordingly, 'in order to avoid the possibility of any misunderstanding' the British Ambassador under instructions from London stated 'that any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by His Majesty's Government as creating a very serious situation.' "
>
> M. S. Records, State Department, released Feb. 20, 1927.

It is safe to assume that because of the attitude of foreign governments the Government of the United States was actuated in ordering the release of all vessels seized beyond the three-mile limit that had not made contact with the shore with their own boats and we believe that the United States discontinued the

practice of such seizures and again negotiated with Great Britain to bring about a treaty between the two nations to effectively cure the situation that confronted and embarrassed the United States in attempting to seize foreign ships under the theory of extraterritorial municipal law.

During 1923 continued negotiations were carried on between the Government of the United States and Great Britain to bring about a treaty satisfactory to both. The Courts were divided as to the right to seize foreign vessels and the various Departments of the Government were likewise apprehensive and realized the embarrassing situation that confronted the United States.

The Courts and the Executive Departments were aware of the fact that even though the Courts might sustain the seizure of foreign vessels in cases of "Unit of Control," that did not preclude a foreign government from claiming damages as a result of the seizure under the rule of International Law recognized and insisted upon by most nations, particularly Great Britain and the United States.

IV.

The Treaty of May 22, 1924, Dealt Completely With the Seizure of British Vessels Beyond Territorial Waters, That Is Beyond the Three-Mile Limit.

On January 23, 1924, the Secretary of State announced a treaty with Great Britain to prevent the smuggling of intoxicating liquors. The announcement was made in an address before the Council on Foreign Relations in New York City. The Secretary of State reviewed at length the international problems which had arisen out of the seizures of foreign vessels be-

yond the three-mile limit and which it was the purpose of the Treaty to set at rest. The Secretary of State said in part:

> "The Government of the United States has repeatedly asserted that the limits of territorial waters extend to three marine miles outward from the coastline. * * * It is quite apparent that this Government is not in a position to maintain that its territorial waters extend beyond the three-mile limit and in order to avoid liability to other Governments, it is important that in the enforcement of the laws of the United States this limit should be appropriately recognized."
>
> American Journal International Law, Vol. 18, No. 2, p. 229.

The Treaty was signed on January 23, 1924. Ratifications were exchanged and the Treaty proclaimed by the President on May 22, 1924 (43 Stat. 1761).

The President described the Treaty in his proclamation as a convention "to aid in the prevention of the smuggling of intoxicating liquors into the United States."

In the preamble of the Treaty it is recited that the two nations,

> "Being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of intoxicating beverages:
>
> "Have decided to conclude a convention for that purpose; * * *"

The convention, or such parts thereof as are pertinent hereto, are set out on page 43-47 (*infra*).

The Treaty expressly stated therein to have been for the purpose of "avoiding any difficulties which might arise" between the United States and Great Britain

"in connection with the laws in force in the United States on the subject of alcoholic beverages."

There had been difficulties. The United States had seized vessels beyond the three-mile limit, as in this case, which had neither themselves nor by their own boats come into the waters of the United States. Such vessels had always been regarded by both nations and by international law as being on the high seas and immune—if the sovereign chose to insist upon it—from any exercise of authority by another nation.

The Treaty concluded to define the jurisdiction which the United States might exercise beyond the three-mile limit. The rights conferred were strictly limited and exclusive. In Article I of the Treaty the two nations agree that it is their firm intention to uphold the principle that *three* marine miles from low water mark constitute the proper limits of territorial waters.

The rights conferred upon the United States for dealing with vessels carrying or suspected of carrying alcoholic liquors were exclusive. Paragraph 3, Article II, of the Treaty provides:

> "The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions, than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense."

Only the specific jurisdiction mentioned in the Treaty was conferred and all other was prohibited.

In *The Frances Louise,* 1 Fed. (2d) 1004, 1005-6, Judge Morton said:

> "At the time of the seizure the treasury officials were under the impression that the Katherine B was capable of making the distance from the

Frances Louise to land within one hour. It was upon this ground that the schooner was seized as coming within the provisions of the treaty between this country and England which went into effect on May 22, 1924. Subsequent investigation showed that the Katherine B was not capable of such speed. The government officials thereupon asserted the right to seize the schooner outside of the provisions of the treaty. No contention is now made by the government that the seizure is within the terms of said treaty. The government's present contention is that as the schooner was 'trading with the shore'—by which is meant that she was delivering alcohol to small boats which put out from the shore—she is subject to seizure and forfeiture under the general principles of international law; and that the treaty does not cut down this general right of seizure.

"I have great doubt whether any such broad right of seizure exists as the government contends. But it is not necessary to decide this question, because I am clearly of the opinion that the whole situation is covered by the treaty. The circumstances surrounding the execution of that treaty are matters of general knowledge. Vessels of British registry were lying off our coasts, delivering liquor to small boats, which smuggled it ashore. Seizures of such vessels were made by our officials, which were regarded by the British government as unjustified by international law, and led to representations by the British government to this country. On the other hand, British ships found themselves much embarrassed by the decision of the Supreme Court in Cunard S. S. Co. v. Mellon, 262 U. S. 100, 43 S. Ct. 504, 67 L. Ed. 894, 27 A. L. R. 1306, concerning supplies of liquor which they customarily carried for use on board. Under these circumstances the treaty was negotiated. It dealt explicitly with the case of liquor ships hovering on our coast and being visited by small boats from shore. Of course, such small boats only came to the hovering vessel to get con-

traband goods. Both parties understood that. The plain inference is that such trading does not render the hovering vessel amenable to seizure as long as she keeps to the high seas, except as provided in the treaty. I think both nations intended the treaty to deal with the matter in a complete way. If so, upon familiar principles of law, it is conclusive. See Texas & Pacific Ry. Co. v. Abeline Cotton Oil Co., 204 U. S. 427, 436, 437, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075. The construction of it is a judicial question. Jones v. Meehan, 175 U. S. 1, at page 32, 20 S. Ct. 1, 44 L. Ed. 49. I have no doubt that it is constitutional. It follows that each of the libels must be dismissed."

In the above case the contention was made that even though the vessel had been seized beyond the limits permitted by the Treaty, its seizure was justified under international law, and that the Treaty did not cut down that alleged general right of seizure. The Court refused to consider any alleged general right of seizure under international law, holding that the Treaty dealt with the entire matter of seizure in a complete way. Application for writ of certiorari was dismissed by the Supreme Court on February 1, 1926, on motion of the Solicitor General. 270 U. S. 666, 46 Sup. Ct. 209, 70 L. Ed. 789.

In *The Sagatind,* 11 F. (2d) 673, the Circuit Court of Appeals for the 2nd Circuit held:

"We agree with The Frances Louise, (D. C.) 1 F. (2d) 1004, that these treaties exclusively determine the status of vessels of appropriate nationality lying off the shore of the United States; but nowhere in the treaties can any words be found indicating an intent on the part of the contracting parties to change or extend the limits of the territory of the United States. In fact, the contrary is plainly indicated by Article I of each treaty.

> "Whatever rights government derived from the treaties must be discovered in Article II of each document. Of this article, Section 1 relates wholly to search, and Section 3 to the distance from shore at which all rights may and must be exercised."

The United States did not appeal. In the same case (4 F. (2d)) 928-930) District Judge A. N. Hand said:

> "The foregoing treaty extends any limitation which might exist upon the jurisdiction of the court to proceed against offending vessels which may be subject to forfeiture for violations of our laws 'prohibiting the importation of alcoholic beverages' to such cases as may come within the terms of the treaty, and, I think, also implies as an alternative rule of treaty-made law that vessels shall not be proceeded against for violation of such laws when seizure was made beyond the distance from our coast prescribed in the treaty. In other words, the treaty completely deals with the extreme right of seizure upon which initial jurisdiction of the cause of forfeiture must depend."

In The *Majorie E. Bachman,* (D. C. Mass.) 4 F. (2d) 405, 408, the Court said (Morton, J.):

> "Moreover, as to British vessels, this country has expressly agreed not to seize them, except within the provisions of the Treaty. As to them, if there is no case under the Treaty, there is no case at all when they are on the high seas."

Application for writ of certiorari was dismissed by the Supreme Court February 1, 1926, on motion of the Solicitor General. 270 U. S. 666, 46 Sup. Ct. 209, 70 L. Ed. 789.

The Treaty deals completely with the present case and the above decisions clearly support our view. The

speed of the Mazel Tov was found as a fact by the District Court to be between 9 and 10 knots an hour. She was seized at a greater distance from our coast than she could traverse in one hour, even though the place of seizure was 11½ miles from the Coast of the United States.

The Constitution of the United States declares a Treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. *Sullivan* v. *Kidd,* 254 U. S. 433, 440, 41 Sup. Ct. 158, 65 L. Ed. 344.

The present Treaty completely sets forth what is agreed by both parties to the Treaty and exactly what may be done by each. No legislation was necessary to put the Treaty into effect. The rights of both nations, contracting parties, and all citizens or subjects of both are therein defined.

During the period between January 23, 1924, when the Treaty was signed, and May 22, 1924, when it was proclaimed by the President, certain hearings in Congress were held with respect to the Treaty. Bills were introduced that were drawn practically in the language of the sections of the Tariff Act involved here, on the theory that the Treaty required legislation, and on March 3, 1924, the Secretary of State addressed a communication to the House Committee on Foreign Affairs in part as follows:

> "The proposed treaty is, in a strict sense, self-executing, requiring no legislation on the part of Congress to make it effective."

This statement satisfied the members of the Committee, as no further action was taken with respect to

the bills that were introduced and the hearings that had been held. (65 Cong. Rec. pt. 7, page 6723—April 19, 1924—Hearings House Committee on Foreign Affairs Res. 174, 68th Cong., 1st sess., Feb. 20 and March 7, 1924.)

It was obviously the intent of the United States to seize ships engaged in the rum-smuggling business and any applicable provisions of the American law might be invoked. While the Treaty does not specify or enumerate what laws would be applicable, it is now certain that the National Prohibition Act and the Tariff were intended to be limited by the Treaty.

In the case of *Ford* v. *United States,* 273 U. S. 593, in an opinion written by Chief Justice Taft, the Court said at page 618:

> "The parties were dealing with a situation well understood by both. In effect they wished to enable the United States better to police its seaboard by enabling it within an hour's sail from its coast beyond its territorial jurisdiction and on the high seas, to seize British actual or would be smugglers of liquor and, if they were caught, to proceed criminally against them as if seized within the three-mile limit for the same offenses in reference to liquor importation. No particular laws by title or date were referred to in the treaty but only the purpose and effect of them."

The weight of authority certainly sustains the view first enunciated by Judge Morton in the case of *The Frances and Louise,* that the Treaty deals completely with the subject and excludes all territorial seizures not made in conformity with their terms. This view has been followed by two Circuit Courts of Appeals, in the case of *The Quadra,* 10 F. (2d) 339, 346; *The Sagatind,* 11 F. (2d) 673; and by District Court Judge

Letts in this case, and by this Court in *Ford* v. *U. S.*, *supra.*

It seems strange that after the United States obtained foreign consent to seizures within a zone beyond the territorial limit, that they should attempt in a case not permitted by the Treaty to proceed to take jurisdiction under an Act of Congress that has never received the consent or acquiescence of the foreign government, and which was superseded and repealed in part by the Treaty.

This point was clearly enunciated in the statement of the Secretary of State of July 19, 1923, to the British Government, wherein he said:

> "It may confidently be asserted that there would be no disposition on the part of the American authorities, and the special agreement would not justify any attempt, to seize a British vessel, save within the limits proposed, and when it was clear that the vessel concerned was directly involved in an attempt to introduce its illicit cargo into the territory of the United States."
>
> M. S. Records, Department of State.

In the recent case of *United States* v. *Maul*, 274 U. S. 501, in the concurring opinion Justice Brandeis said:

> "Congress cannot have intended to confer the general authority to seize foreign vessels upon the high seas. * * * There is no foundation for the assumption of the claimant that the first paragraph of Section 581 was intended as the exclusive grant of the power to seize. The primary purpose of that paragraph was not to provide for the seizure of American vessels of known or suspected guilt. It was to facilitate, by means of boarding and examination of manifest before arrival in port, both the entry of admittedly innocent vessels and the collection of revenues. This end was fur-

thered by enabling customs officers to board and search any vessel, foreign or domestic, within the stated limits, without the necessity of establishing probable cause. The authority to board and search foreign vessels beyond the territorial limits would doubtless not have been implied as a mere incident of the customs officers' duties, and it is probable that the authority to board and search American vessels in the absence of probable cause was not regarded as clear. * * *

Neither in the negotiations nor in the conventions was any reference made to a 12-mile limit. The limitation agreed upon was an hour's run from our coast. The distance covered by the hour's run would often greatly exceed 12 miles from our coast. But Congress did not deem it necessary to enact supplementary legislation in order to make the conventions effective."

The United States in spite of its own twelve-mile statute had, prior to the Treaty, protested against the unreasonable exercise of a similar power on the part of Mexico, and reserved all rights relative to the Russian Law of 1909.

The United States, both through its courts and executive departments, has indicated that only in cases where contact with shore can be established and in the case of hot pursuit did it insist upon the right to seize vessels on the high seas beyond the three-mile limit and within four leagues for violation of local law.

The Circuit Court of Appeals erred in vacating the decrees of the District Court and holding the seizure was valid under Section 581 of the Tariff Act. No seizure can be made outside the Treaty distance. It excludes all seizures not made in conformity with its terms. The Treaty deals completely with the question presented here and the seizure is unlawful. This case does not present a state of facts consistent with the

position of the United States in seizing vessels under the theory of "Unit of Control" or "Hot Pursuit."

The Court found that the Mazel Tov was never in the territorial waters of the United States; that it did not intend to approach nearer than four leagues from the coast and that the seizure being unlawful no penalties could be assessed against her. The Mazel Tov did not violate any law of the United States, and being seized at a point beyond that provided for by the Treaty is not subject to any laws of the United States made applicable by the Treaty in a proper case.

V.

Section 581 of the Tariff Act of 1922 Was Passed By Congress At the Risk of International Complications for the Purpose of Searching and Seizing British and Other Foreign Liquor Vessels Pending Negotiations of Rum-Smuggling Treaties.

An examination of the debates in Congress at the time of the passage of Sections 581 and 584 of the Tariff Act of 1922 discloses that on July 6, 1922, Senator Sterling proposed the following amendment to this Section:

> "Officers of the Customs, the Coast Guard, the Treasury Department, or other officers whose duty it is to enforce the National Prohibition Act, may go on board any vessel, at any place in the United States or within six marine leagues of the coast of the United States, and hail, stop and board such vessel in the enforcement of the laws prohibiting, regulating, taxing or relating to the liquor traffic.
>
> "The provision of the National Prohibition Act and other laws relating to intoxicating liquors shall be in full force and effect within six marine leagues of the Coast of the United States and shall

be enforced by such officers who shall have all of the authority conferred by this section and by Section 3067 of the Revised Statutes (Act of March 2, 1799, Chapter 22, First Statutes at Large, page 668), upon Customs Officers in the enforcement of the Customs Laws."

On August 19, 1922, Senator Sterling filed the following amendment modifying the original amendment of July 6, 1922:

"Officers of the customs, the Coast Guard, the Treasury Department, or other officers whose duty it is to enforce the National Prohibition Act, may go on board any vessel, at any place in the United States or within 4 marine leagues of the coast of the United States, and hail, stop and board such vessel in the enforcement of the laws prohibiting, regulating, taxing, or relating to the liquor traffic; and such officers shall have all of the authority conferred by this section and by Section 3067 of the Revised Statutes (Act of March 2, 1799, ch. 22, 1 Stat. L. 668) upon customs officers in the enforcement of the customs laws."

He carefully explained to Congress that he thought Congress could extend the 3-mile limit, but at the risk of international complications which might subject the United States to claims for damages because of interference with vessels of other nations. He said further:

"Let me say to the Senator that I hope arrangements will be made with other nations covering that matter. I think the Secretary of State is in entire good faith endeavoring to make such an arrangement."

Mr. Sheppard (co-author of dry law):

"I trust the Secretary of State will be sucessful.

> It is a matter, however, which we cannot allow to rest until permanently and satisfactorily settled."

Mr. Sterling:

> "I agree with the Senator from Texas." (See Cong. Rec., Vol. 62, Pt. 2, 67th Congress, 2nd Sess., p. 11593.)

It seems clear that the reason for the passage of this Section was to cover the period of the pending negotiations for a Treaty with Great Britain to allow seizure of British rum-smuggling ships, depending upon the acquiescence of the foreign nations.

VI.

Congress Did Not Intend to Alter the Status and Effect of the Treaty of 1924 When It Re-enacted in 1930 Sections 581 and 584 of the Tariff Act of 1922, and the Treaty Amounts to a Limitation of These Sections.

An examination of the Congressional Record, committee hearings and the original Tariff Bill of 1930 as introduced in Congress, discloses that the pertinent sections of the Tariff Act of 1930 here involved (c. 497, 46 Stat. 590, 747, 748 and 751) were re-enacted in 1930 without any debate or amendments thereto. The Tariff Act as finally passed indicates that Congress did not intend in any way to affect the provisions of the Treaty entered into in 1924.

Article V of the Treaty provides that the Treaty

> "shall remain in force for a period of one year from the date of ratifications, and if no notice is given by either party three months before the expiration of the year the Treaty will continue in force for another year and so on automatically, etc."

No overt act was taken by either party and the re-enactment of Section 581 of the Act of 1922 in the Act of 1930 cannot be said by any stretch of imagination to be notice by the United States that the Treaty is to terminate.

Treaties and laws of the United States are both declared by the Constitution to be the supreme law of the land. It has frequently been declared that so far as a treaty operates of its own force as municipal law it supersedes prior inconsistent acts of Congress.

This principle has been applied in the following cases:

United States v. *Schooner Peggy,* 1 Cranch. 103.
Headmoney Cases, 112 U. S. 580, 599.
The Chinese Exclusion Case, 130 U. S. 581.
Horner v. *United States,* 143 U. S. 570.
Fong Yue Ting, 149 U. S. 698.
Johnson v. *Browne,* 205 U. S. 309.
Charlton v. *Kelly,* 229 U. S. 447, 463.
United Shoe Machinery Co. v. *Duplessis Shoe Machinery Co.,* 115 Fed. 842.

When the two relate to the same subject the Courts will always endeavor to construe them so as to give effect to both if that can be done without violating the language of either, but if the two are inconsistent the one last in date will control the other, provided always the stipulation of the Treaty on the subject is self-executing. *Whitney* v. *Robertson,* 124 U. S. 190.

Mr. Justice Harlan, in speaking for the Court in *United States* v. *Lee Yen Tai,* 185 U. S. 213, although no conflict between the treaty and statute in question was found to exist, added:

> "That it was competent for the two countries by treaties to have superseded a prior Act of Con-

> gress on the same subject is not to be doubted, for otherwise the declaration in the Constitution that a treaty concluded in the mode prescribed by that instrument shall be the supreme law of the land would not have due effect. As Congress may by statute abrogate, in so far at least as this country is concerned, a treaty previously made by the United States with another nation, so the United States may by treaty supersede a prior Act of Congress on the same subject."

In the case of *Charlton* v. *Kelly*, 299 U. S. 477, Mr. Justice Lurton, speaking for the Court, said:

> "Of course, the effect of the supplemental treaty of '84 being later than the statutory requirements above referred to is to supersede the statute in so far as there is a necessary conflict in carrying out the extradition obligations between this country and Italy."

If the Treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment.

There is little difficulty in concluding that Article III of the Treaty, which provided no forfeiture or penalty should attend the transportation of sealed liquors in American waters was self-executing, in other words, no legisation was required to give it effect. The treaty, *ipso juri*, superseded and repealed so much of the Prohibition Act as was inconsistent therewith. The doctrine that subsequent treaties override legislative acts is well-established. See *Davis* v. *Concordia*, 9 Howe 280, 13 L. Ed. 208; *Whitney* v. *Robertson*, *supra*, and other authorities collected; 5 *Moore's Digest* 370.

It certainly follows that if the above contention is correct, and we believe it to be, that the provisions of

Article II of the Treaty superseded and repealed so much of the Tariff Act as was inconsistent therewith, and re-enactment of in 1930 of any of the inconsistent sections of the 1922 act are superseded and repealed as long as the Treaty remains in force.

VII.

The Libels Under Section 584 Should Not be Sustained in View of the Locality of the Seizure, Being at a Point Beyond That Provided By the Treaty.

Section 584 of the Tariff Act is to furnish customs officials the right to examine manifests and to inform our revenue officers what goods are being brought into the country and to provide a safeguard against goods being brought into this country on a vessel and then smuggled ashore. It was for those purposes and to forestall that danger to the revenue that the statute in question was passed. It is explicitly restricted to vessels or vehicles bound to the United States.

In the present case the evidence discloses that at the time the Mazel Tov was boarded by officers of the Coast Guard the master was under the impression that he was at least twelve miles from the shore of the United States. The commander of the Coast Guard vessel informed the master that he was eleven and one-half miles from the United States. The District Court in its opinion stated that the master did not intend to come within the territorial limits of the United States. The Court of Appeals erred in disturbing the finding of the District Court when no motion on behalf of the United States for a trial *de novo* was filed and its conclusion based on the testimony was incorrect. The record does not disclose any unlading and cases in which vessels came into the territorial waters of the

United States or were found to have been bound to the United States are not applicable in so far as the Mazel Tov is concerned.

It follows that if the seizure was unlawful, as we contend, the Government should not be permitted to attempt to collect penalties under Section 584, which statute is directed wholly to cases bound for the United States, and to permit such assessment is to go to the extreme limit in extending this statute by judicial construction.

In the present case, the ship's papers were promptly produced, including a manifest (R. 22-24).

Section 584 is to facilitate a protective and general examination of vessels and cargoes when the vessel has arrived in the United States.

In *The Sylvia II*, 28 F. (2d) 215 (Dist. Ct. Mass.), which involved the seizure of a British schooner within the twelve-mile limit, District Court Judge Morton said:

> "On all the evidence I am satisfied that The Sylvia II was at the time of the seizure within 12 miles of the shore of Cape Cod. She had not unladen any of her cargo nor been within any territorial waters of the United States since taking it on board, nor had she been in contact with any boats from the shore nor been in contact with the shore herself. She was not and had not been during the voyage within a distance from the coast which she could traverse in one hour. Her master did not intend to come within 12 miles of our coast. His doing so was a mistake on his part. That the cargo was destined ultimately to this country and that its destination was known to the master of the Sylvia II is clear. * * * The ground of forfeiture alleged against this vessel is hardly more than a colorable pretense. Her real offense is that she was hovering on our coast with cargo for

> smugglers. * * * Upon the facts stated I rule that the Sylvia II was not bound for the United States. * * *
>
> "It is unnecessary to decide whether as to British vessels the 12-mile limit has been superseded by the one hour's distance specified by the treaty, but I may say that *Ford* v. *United States,* 273 U. S. 593 at p. 609, 47 Sup. Ct. 531, 71 L. Ed. 793, seems to me not inconsistent with the view which I expressed in *The Frances Louise,* (D. C.) 1 F. (2d) 1004."

In the case of *The George and Earl,* (D. C. East. Dist.) 30 F. (2d) 441, which was the seizure of a British schooner beyond the three-mile limit, District Judge Inch said:

> "Unless I can find that the vessel was so bound to the United States there was no right to board her and seize her for not producing a manifest. She did not become bound to the United States because she was subsequently towed there by a Coast Guard boat. I am not unmindful of the suspicious circumstances that always arise from a cargo of rum near our shores; but suspicion is not proof and to forfeit a vessel or a cargo under our laws requires proof of some sort which indicates at least a probable cause for the suit.
>
> "It was not unlawful for this schooner to be sailing with a cargo of liquor outside the territorial jurisdiction of the United States. *Cunard S. S. Co.* v. *Mellon,* 262 U. S. 100, 43 Sup. Ct. 504, 67 L. Ed. 894."

See also the concurring opinion of Justice Brandeis in *U. S.* v. *Maul, supra.*

We submit that the seizure is in violation of the Treaty and Section 584 cannot be construed to apply to the present case.

VIII.

Question Properly Raised Below: The Controlling Question in the District Court and the Court of Appeals Was Whether the Seizure Was Lawful in View of Treaty Provisions and the Government Should Not Be Permitted to Change the Theory of the Case in This Court on Review.

In the first libel filed by the Government it was alleged in part (Libel 1646, R. 2) paragraph five:

> "The Mazel Tov, its speed and the speed of such other vessel or vessels was such that it could and did reach the coast of the United States by traversing the distance from the coast to the Mazel Tov within one hour."

Paragraph nine, in part (R. 3):

> "Contrary to the form of the statute and of the Treaty between the United States and Great Britain in such case made and provided."

In the second libel filed (1647, R. 6) paragraph three states, in part:

> "The Mazel Tov, its speed and the speed of such other vessel or vessels was such that it could and did reach the coast of the United States by traversing the distance from the coast to the Mazel Tov within one hour."

In the answers and exceptions the claimant respectfully stated that the vessel was not seized within the territorial limits of any jurisdiction of the United States, and further denied the allegation of any violation of the provisions of the Treaty between the United States and Great Britain, as alleged in the Government's libel.

The petitioner intervened and filed a claim protesting—

> "That the seizure of the Mazel Tov was in violation of the laws and statutes of the United States of America, etc."

The Government attempted to prove that the Mazel Tov could traverse the distance from the point of seizure to the United States in less than one hour.

The evidence at the trial was devoted to questions raised by the answers and exceptions and the Court proceeded in its opinion to determine whether or not the seizure was valid in accordance with the provisions of the Treaty between the United States and Great Britain.

In its exception upon appeal the United States did not contend that the question of the effect of the Treaty upon the validity of the seizure had not been properly raised, but contended that the Court had erroneously decided the question of such effect (R. 87-89). In its brief on appeal it questioned whether or not the legality of the seizure under the Treaty was in issue under the pleadings and whether or not all questions of jurisdiction were waived. The Circuit Court of Appeals ignored this point and held that the seizure at the place as found by the District Court was valid under the Tariff Act which was in no way modified by the Treaty.

We contend that the Government is estopped to urge that the question before this Court was not properly at issue below, or that even though the seizure is irregular and unlawful the libels can be sustained.

It is believed that the Government in its brief will suggest that the question of the validity of the seizure should have been raised by a preliminary and special plea to the jurisdiction and that the point was waived

by the filing of an answer upon the merits, even though the point was raised in such answer.

We submit:

(1) That there is no basis whatever, either in authority or in practice, for the suggestion that in a proceeding *in rem* in admiralty for the forfeiture of a foreign vessel the failure to file a separate and special plea to the jurisdiction of the Court is fatal to the consideration of the question of the validity of the seizure of the vessel, when raised *in limine* in the answer and the exceptions.

(2) Whatever may be the better practice, the Government is not now in a position to contend that the issue is not presented on this record—"it being clear that there is no jurisdictional defect in the pleadings."

Few questions are more troublesome than those relating to the pleading of jurisdictional questions. Whether such a question has been properly raised in the record has been made to turn not only upon the nature of the question, but upon the character of the Court, the status of the party raising it, and the time and circumstance of the pleading.

We do not believe determination of this case will involve any question in this vexing field relating to the proper pleading of objections to the jurisdiction of the Court, we do not feel that the issue raised in reality related to the jurisdiction of the Court. *Rather the question of the validity of the seizure related to the authority of the administrative officers to have made the seizure at the place they did* (*Crowell* v. *Benson*, 285 U. S. 76, L. Ed. Advance Opinions, p. 369, note 17). Thus the question raised by the locality of the seizure was one of the merits of the cause—whether the penalties could be lawfully imposed; whether the statute had been violated. The question thus presented was determined by the Court in the exercise of its juris-

diction *in rem* over a vessel within its possessions and depended upon the application of the statute and Treaty. If this be true, then indisputably the question under the Treaty was properly raised as a defense in the answer and exceptions.

But if the question arising under the Treaty did go to the jurisdiction of the Court, it must have related either to its jurisdiction over the parties or over the subject-matter. It has frequently been said that objections to the jurisdiction of a Court over the parties may be waived (*Ford* v. *United States,* 273 U. S. 593, 606), but that questions relating to the jurisdiction of Courts over the subject-matter may be raised at any time, since such jurisdiction cannot be conferred by consent of the parties. *Gainesville* v. *Brown-Crummer Co.,* 277 U. S. 54, 59; *Stratton* v. *St. Louis S. W. Ry.,* 282 U. S. 10, 13, 18; *Mansfield R. Co.* v. *Swan,* 111 U. S. 379, 383-384.

This being a proceeding *in rem,* this question relating to the construction of the Treaty, if treated as going to the jurisdiction of the Court, cannot be regarded as an objection to the jurisdiction over the parties. The Court had jurisdiction over the vessel, and at the very least had jurisdiction to determine its own jurisdiction. Therefore, if the question goes to the jurisdiction of the Court at all, it is to its jurisdiction over the subject-matter—an objection which cannot be waived and may be raised at any time. Moreover, it is arguable that, since an appeal in admiralty is a trial *de novo,* the question under the Treaty—whatever its nature—might have been raised for the first time in Circuit Court of Appeals; *and it is not denied that in that Court the issue under the Treaty was regarded as the controlling point in the case.*

Nor is this case to be confused with those which hold that a seizure of a domestic vessel in foreign waters is

at most a trespass which does not raise any question militating against the jurisdiction of the proper Federal Court on a subsequent valid seizure of the vessel by civil authorities. *The Richmond,* 9 Cranch 102; *The Merino,* 9 Wheat. 391, 402. Here the question relates to the lawfulness of the imposition of penalties upon a *foreign* vessel under the Tariff Act, and turns upon whether seizure of the vessel at a particular locality upon the high seas was a violation of our Treaty with Great Britain.

But whatever be the character of the question raised under the Treaty—whether it be regarded as going to the jurisdiction of the Court or not—we contend that on the record it was raised in a manner which is timely and proper under the *admiralty* practice. We submit that the "serious doubts" of the Government are engendered by the assumption—*not founded upon authority*—that the strict common law rule relating to the order of pleadings, whereby pleas in abatement must precede pleas to the merits and are waived when the latter are filed, is applicable to proceedings *in rem* in admiralty.

There was clearly no express waiver in the Courts below of the precise point which it is now sought to have reviewed in this Court. The point was treated by both Courts below as having been properly put in issue, and was decided.

There is no case holding that the question of the validity of the seizure of a foreign ship, in view of the Treaty, may not be properly raised under the admiralty practice by answer and exceptions.

If considered as a question going to the jurisdiction of the Court, it is not a question of jurisdiction over the person for the proceeding is *in rem;* it must, therefore, be an objection to the jurisdiction of the

Court over the subject-matter, and, therefore, may be raised at any time.

The question is not really of the jurisdiction of the Court, but of the authority of the administrative officers, and its determination, which turns upon the construction of the Treaty and application of the statutes, was within the jurisdiction of the Court and the question was properly put in issue in the answer and exceptions.

Assuming, but not admitting, that it would have been better pleading to challenge the validity of the seizure by a separate special plea to the jurisdiction, the government is bound by the theory upon which the case was tried in the trial court and heard in the Circuit Court of Appeals, and is estopped to contend that the question presented to this Court was not properly in issue below. Petitioner's objection to the validity of the seizure raised by the answers and exceptions were not subjected to exception or objection by the government at trial; both parties introduced evidence upon the issue and the opinions of both trial court and Circuit Court of Appeals proceeded upon the theory that the controlling question was whether the seizure was lawful in view of the Treaty stipulations. The language of Mr. Justice Van Devanter, speaking for the Court in *San Juan Light Co.* v. *Requena,* 224 U. S. 89, 96, 97, is strikingly in point:

> "The trial proceeded upon the theory that the question whether the defendant had failed to exercise appropriate care in the maintenance and inspection of its outside wires and converters was within the issues. Each party, without objection from the other, introduced evidence bearing upon that question; and when it was submitted to the jury there was no exception upon the ground of a variance. *Effect must, therefore, be given to the*

well-settled rule that where the parties, with the assent of the court, unite in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes before an appellate court for review."

This is a well-settled and generally accepted rule. See *Milton* v. *Pensacola Bank & Trust Co.*, 190 F. 126, 136 (C. C. A. 6th); *Brockenborough* v. *Champion Fibre Co.*, 176 F. 840, 842 (C. C. A. 4th); *Sutherland* v. *Sutherland*, 102 Ia. 535; *Tarbul* v. *Royal Exc. Shipping Co.*, 110 N. Y. 170; *Morrison* v. *Atkinson*, 16 Okla. 571; *Knoop* v. *Kelsey*, 102 Mo. 291, 10 R. C. L. 701, Sec. 281.

It appears from an examination of the reported cases in the District Courts of the United States that it is the practice to raise in the answer and exceptions any question affecting the jurisdiction of the Court. The same practice has been followed whenever the validity of the seizure has been questioned.

The Government in its memorandum stated that conflicting opinions upon the question here involved makes the case of sufficient importance to warrant granting the writ. The Government pointed out in its memorandum that there was some doubt in its mind that the question had not properly been raised. This Court granted the writ of certiorari on October 10, 1932. It is safe to assume that this Court did not deem the suggesion of the Government material.

Conclusion.

The decree of the Court of Appeals should be vacated and the decrees of the District Court be affirmed.

Respectfully submitted,

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APPENDIX.

A.

The pertinent provisions of the Tariff Act of 1922, c. 356, 42 Stat. 858, 979, are as follows:

Section 581: *Boarding vessels.*

"*Boarding Vessels.*—Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, *and to arrest*, or, in case of escape or attempted escape, *to pursue and arrest any person* engaged in such breach or violation.

"Officers of the Department of Commerce and other persons authorized by such department may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws."

B.

The pertinent provisions of the Tariff Act of 1930, c. 497, 46 Stat. 590, 747, are as follows:

Section 581: *Boarding vessels.* Re-enacted verbatim section 581 of the 1922 Act.

Section 584 of the Tariff Act of 1930:

"*Falsity or lack of manifest*—(U. S. C. Sup. V, Title 19, Sec. 1584)

"Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after having been unladen from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge or the owner of such vessel or vehicle shall be subject to a penalty of $500: *Provided,* That if the collector shall be satisfied that the manifest was lost or mislaid without intentional fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake and that no part of the merchandise not found on board was unshipped or discharged except as specified in the report of the master, said penalties shall not be incurred.

"If any of such merchandise so found consists of smoking opium or opium prepared for smoking,

the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty of $25 for each ounce thereof so found. Such penalty shall, notwithstanding the proviso in section 594 of this Act (relating to the immunity of vessels or vehicles used as common carriers), constitute a lien upon such vessel which may be enforced by a libel *in rem;* except that the master or owner of a vessel used by any person as a common carrier in the transaction of business as such common carrier shall not be liable to such penalty and the vessel shall not be held subject to the lien, if it appears to the satisfaction of the court that neither the master nor any of the officers (including licensed and unlicensed officers and petty officers) nor the owner of the vessel knew, and could not, by the exercise of the highest degree of care and diligence, have known, that such smoking opium or opium prepared for smoking was on board. Clearance of any such vessel may be withheld until such penalty is paid or until a bond, satisfactory to the collector, is given for the payment thereof. The provisions of this paragraph shall not prevent the forfeiture of any such vessel or vehicle under any other provision of law."

C.

Pertinent provisions of the Treaty with Great Britain dated May 22, 1924 (43 Stat. 1761):

"Article I.

"The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.

"Article II.

"(1) His Brittanic Majesty agrees that he will raise no objection to the boarding of private ves-

sels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaning whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

"(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

"(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the *right under this article can be exercised.*

"Article V.

"This Treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

"Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its desire to propose modifications in the terms of the Treaty.

"If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the Treaty shall lapse.

"If no notice is given on either side of the desire to propose modifications, the Treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the Treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the Treaty shall lapse.

"Article VI.

"In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present Treaty the said Treaty shall automatically lapse, and, on such lapse or whenever this Treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this Treaty not been concluded.

"The present Convention shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Brittanic Majesty; and the ratifications shall be exchanged at Washington as soon as possible.

"In witness whereof, etc."

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No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1932

FRANK COOK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

NOTE OF DECEMBER 5, 1932, ADDRESSED TO THE HONORABLE HENRY L. STIMSON, SECRETARY OF STATE OF THE UNITED STATES, BY THE HONORABLE W. D. HERRIDGE, MINISTER OF CANADA

In the Supreme Court of the United States

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NOTE OF DECEMBER 5, 1932, ADDRESSED TO THE HONORABLE HENRY L. STIMSON, SECRETARY OF STATE OF THE UNITED STATES, BY THE HONORABLE W. D. HERRIDGE, MINISTER OF CANADA

The following note was left at the Department of State by the Canadian Minister on December 5, 1932. The Government brings this note to the attention of the Court as an expression of the views entertained by the Government of Canada upon the interpretation of the Treaty of 1924 with Great

149809—32

Britain, to be considered in connection with the Government's brief already filed herein:

DECEMBER 5TH, 1932.

No. 219.

SIR:

Under instructions from the Secretary of State for External Affairs of Canada, I have the honour to bring to your attention the legal proceedings arising out of the seizure by the United States Coast Guard on November 1st, 1930, of the Canadian vessel MAZELTOV. It is understood that the Supreme Court of the United States has granted the petition of the appellant in this case (*Cook* v. *The United States of America*, No. 82) for a writ of certiorari, and that, accordingly, this matter will in the near future come before the Supreme Court for its consideration.

His Majesty's Government in Canada have considered the Opinion of the United States Circuit Court of Appeals for the First Circuit, delivered by Mr. Justice Bingham, with regard to this seizure. It is understood that the proceedings have established that the MAZELTOV, at the time of the seizure, was on the high seas, beyond United States territorial waters, and at a point that was more than one hour's sailing distance from the shore. It seems to be clear that, in the circumstances, the seizure and subsequent condemnation of the MAZELTOV can not be justified by the provisions of the Convention concluded at

Washington on the 23rd January, 1924. It is also understood that the court proceeded upon the view that the seizure and condemnation of the vessel were justified by the provisions of the Tariff Act of the United States, and that the provisions of that legislation were not impaired by the conclusion of the 1924 Convention.

Whether or not the Courts of the United States of America regard themselves as being bound by the provisions of this legislation which, in the absence of treaty stipulation, purports to justify the seizure of British ships upon the high seas, it seems to be clear that such seizures are not justified by International Law. It is the view of the Government of Canada that the 1924 Convention was intended by both of the high contracting parties to constitute a complete code, covering all circumstances in which the exercise of jurisdiction over British ships on the high seas could be justified. It can be confidently asserted that it was understood by both of the high contracting parties during the negotiations, that there would be no disposition on the part of the authorities of the United States of America—and that the Convention would not justify any such attempt—to seize a British vessel, save within the conventional limits. Accordingly, it would seem that the seizure of the MAZELTOV and its forfeiture, if continued, would not be justified by International Law, or by the terms of the Convention, and that it would be directly contrary to the understandings of the parties

which formed the basis of the agreement embodied in the Convention.

In these circumstances, I am desired to urge that the Government of the United States should give consideration to the propriety of taking such executive action as may be necessary to prevent the possible establishment of a conflict between the legal position under the municipal legislation of the United States, as exemplified in the decision referred to above, on the one hand, and the position established by the Convention and by the International Law and practice, on the other hand. Any other course would render nugatory the limitations imposed by the Convention and would tend to frustrate the co-operation rendered by His Majesty's Government in Canada over what is now a substantial period of years, which has provided effective assistance to your Government in curtailing, and, in so far as Canadian vessels are concerned, almost eliminating the contraband traffic on the coasts of the United States.

I have the honour to be, with the highest consideration, Sir,

Your most obedient, humble servant,

(Signed) W. D. HERRIDGE.

Respectfully submitted.

THOMAS D. THACHER,

Solicitor General.

DECEMBER, 1932.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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MEMORANDUM FOR THE UNITED STATES

INDEX

	Page.
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutory and treaty provisions involved	2
Statement	2
Reasons for not opposing the petition	5
Appendix	8–13

CITATIONS

Cases:	
Abbey, The, Fed. Cas. No. 14	6
Dodge v. *United States*, 272 U. S. 530	6
Ford v. *United States*, 273 U. S. 593	6
Johnson, In re, 167 U. S. 120	6
Merino, The, 9 Wheat. 391	6
Richmond, The, 9 Cranch 102	6
Rosalie M., The, 12 F. (2d) 970	6
Sheppard v. *Graves*, 14 How. 504	6
Underwriter, The, 13 F. (2d) 433, approved sub nom. *Maul* v. *United States*, 274 U. S. 501	6–7
Treaty and Statute:	
Treaty with Great Britain, May 22, 1924, Art. II (43 Stat. 1761)	11–13
Tariff Act of 1930, c. 497, 46 Stat. 590, 747, 748, 751—	
Sec. 581 (U. S. C. Sup. V, Title 19, sec. 1581)	8
Sec. 584 (U. S. C. Sup. V, Title 19, sec. 1584)	9–10
Sec. 594 (U. S. C. Sup. V, Title 19, sec. 1594)	11

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OPINIONS BELOW

The opinion of the District Court (R. 64–83) is reported in 51 F. (2d) 292. That of the Circuit Court of Appeals (R. 103–114) is reported in 56 F. (2d) 921.

JURISDICTION

The final decree of the Circuit Court of Appeals (R. 114) was entered March 18, 1932. The petition for a writ of certiorari was filed May 16, 1932. While petitioner does not so state, presumably he invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether libels in admiralty under Section 584 of the Tariff Act of 1930 may be sustained against a British vessel and her cargo of intoxicating liquors, seized by officers of the Coast Guard within four leagues of the coast, although not within one hour's sailing distance therefrom.

2. Assuming that such seizure is irregular, under the Treaty of 1924 with Great Britain, does a claimant of the vessel and its cargo waive the irregularity by filing answers to the libels?

STATUTORY AND TREATY PROVISIONS INVOLVED

The pertinent provisions of the Tariff Act of 1930 and of the Treaty of 1924 with Great Britain are printed in the Appendix (*infra,* pp. 8–13).

STATEMENT

Two libels of information in admiralty were filed by the United States in the District Court for Rhode Island. The first was directed against the British Motor Screw "Mazel Tov" and sought the collection out of the vessel, under Section 594 of the Tariff Act of 1930 (*infra,* p. 11), of certain penalties alleged to have been incurred by its master. This libel contained three counts. (R. 2–7.) The first alleged that the master failed to produce a manifest of his cargo; the second that he had on board unmanifested cargo; and the third that his vessel arrived within the limits of a customs col-

lection district and attempted to depart therefrom without making entry. The first two counts were based upon Section 584 of the Tariff Act of 1930 and the third upon Section 585 of that Act.

The second libel (R. 7–10) sought the forfeiture, under Section 584 of the Tariff Act of 1930, of the cargo of the "Mazel Tov" on the ground that it contained unmanifested cargo consigned to the master of the vessel.

The petitioner herein claimed both the ship and the cargo, intervening in the ship libel as master and bailee (R. 14), and in the cargo libel as consignee (R. 17). He then filed answers to both libels on the merits and in such answers excepted to the court's jurisdiction on the ground that the ship was "captured and boarded at a point more than four (4) leagues from the coast of the United States." (R. 14–18.)

From the facts found by the District Court, as contained in its opinion and in separate findings of fact (R. 64 *et seq.*, 89, 94), it appears that on the evening of November 1, 1930, the "Mazel Tov," a vessel of British registry, was boarded by officers of the Coast Guard off the coast of Massachusetts 11½ miles from the nearest point of land. The officers found on board unmanifested merchandise consisting of a large quantity of foreign intoxicating liquors which had been cleared at St. Pierre. It was intended that these liquors should be transshipped to contact boats and landed in the United

States. The speed of the "Mazel Tov" was between nine and ten knots an hour and was insufficient to propel her to the shores of the United States within an hour's sailing time.

The two libels were heard together. After the taking of testimony, they were dismissed by the District Court (R. 83, 85) on the ground that the vessel was seized in violation of the Treaty of 1924 with Great Britain, which provides in Section 3 of Article II that the right of boarding British vessels suspected of liquor smuggling—

> shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense.

The view of the court as to the effect of the treaty was (R. 69) that—

> it dealt completely with the subject of the limits within which search and seizure of British vessels could be made in the enforcement and application of our laws for the prevention of the importation or smuggling of liquor, and that the treaty excludes all extra-territorial seizures (that is beyond the three-mile limit), not made in conformity with the terms of the treaty.

Upon appeal by the United States the Circuit Court of Appeals reversed the decree of the District Court and sustained the second count of the libel seeking collection out of the ship of the penalty for

having unmanifested cargo, and the single count of the libel seeking forfeiture of the cargo, both of which counts were based upon Section 584 of the Tariff Act (*infra*, pp. 9–10). No question was raised by the United States in that court in respect of the count charging failure to produce a manifest, and the United States has not sought review of the adverse decision of the Circuit Court of Appeals with reference to the count asserting a penalty against the vessel for departing from a collection district without making entry.

The Circuit Court of Appeals held, as to the validity of the seizure of the vessel, that the Treaty did not in any way modify or abrogate the provisions of Section 581 of the Tariff Act of 1930 (*infra*, p. 8) authorizing Coast Guard and other officers of the United States to board any vessel "within four leagues of the coast of the United States" for the purpose of examining its manifest and ascertaining whether the vessel or its merchandise is subject to forfeiture for having violated the laws of the United States.

REASONS FOR NOT OPPOSING THE PETITION

As was pointed out by the District Court in its opinion (R. 68–72), there are divergent views in the lower Federal courts as to the effect of the Treaty with Great Britain upon the search and seizure provisions of the Tariff Act of 1930 and of its predecessor, the Tariff Act of 1922. The de-

sirability of removing this difference of opinion and of establishing a rule for the guidance of the administrative officers of the Government is evident, and we therefore do not oppose the granting of the petition. Nevertheless, we desire to call the attention of the Court to certain difficulties which may stand in the way of a decision of the question.

First, the petition and supporting brief do not comply with the rules of this Court in that they contain no reference to the statutory provision relied upon to support this Court's jurisdiction, no assignment of errors, and no reasons, as such, for the allowance of the writ. (Rules 12, 27, 38, par. 2.)

The second difficulty is that there is serious doubt whether the question as to the effect of the Treaty is presented by the record. In proceedings for forfeiture of property seized within the maritime jurisdiction, it may at least be said that the question of the validity of the seizure must be raised by a preliminary and special plea to the jurisdiction, and that the point is waived where it is not raised prior to the filing of an answer upon the merits. *The Abby,* Fed. Cas. No. 14 (C. C. Mass.); *The Rosalie M.,* 12 F. (2d) 970 (C. C. A. 5th), citing *The Merino,* 9 Wheat. 391, *The Richmond,* 9 Cranch 102, and *In re Johnson,* 167 U. S. 120. See also *Ford* v. *United States,* 273 U. S. 593, 606; *Dodge* v. *United States,* 272 U. S. 530, 532; *Sheppard* v. *Graves,* 14 How. 504; *The Underwriter,*

13 F. (2d) 433, 434 (C. C. A. 2d), affirmed *sub nom. Maul* v. *United States,* 274 U. S. 501.

In the instant case the claimant did not raise the question of the validity of the seizure under the Treaty by a preliminary plea. On the contrary, he filed complete answers to both libels on the merits. His so-called exceptions to the jurisdiction of the court were set forth in his answers, and did not claim any violation of Treaty rights, but merely alleged that the boarding of the vessel occurred more than four leagues from the coast of the United States, a reference obviously to the search and seizure provisions of the Tariff Act.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
A. W. HENDERSON,
Special Assistant to the Attorney General.
PAUL D. MILLER,
W. MARVIN SMITH,
Attorneys.

JUNE, 1932.

APPENDIX

The pertinent provisions of the Tariff Act of 1930, c. 497, 46 Stat. 590, 747, 748, 751, are as follows:

SEC. 581. BOARDING VESSELS [U. S. C. SUP. V, TITLE 19, SEC. 1581.]

Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation.

Officers of the Department of Commerce and other persons authorized by such department may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

* * * * *

SEC. 584. FALSITY OR LACK OF MANIFEST—[U. S. C. SUP. V, TITLE 19, SEC. 1584.]

Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after having been unladen from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge or the owner of such vessel or vehicle shall be subject to a penalty of $500: *Provided,* That if the collector shall be satisfied that the manifest was lost or mis-

laid without intentional fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake and that no part of the merchandise not found on board was unshipped or discharged except as specified in the report of the master, said penalties shall not be incurred.

If any of such merchandise so found consists of smoking opium or opium prepared for smoking, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty of $25 for each ounce thereof so found. Such penalty shall, notwithstanding the proviso in section 594 of this Act (relating to the immunity of vessels or vehicles used as common carriers), constitute a lien upon such vessel which may be enforced by a libel in rem; except that the master or owner of a vessel used by any person as a common carrier in the transaction of business as such common carrier shall not be liable to such penalty and the vessel shall not be held subject to the lien, if it appears to the satisfaction of the court that neither the master nor any of the officers (including licensed and unlicensed officers and petty officers) nor the owner of the vessel knew, and could not, by the exercise of the highest degree of care and diligence, have known, that such smoking opium or opium prepared for smoking was on board. Clearance of any such vessel may be withheld until such penalty is paid or until a bond, satisfactory to the collector, is given for the payment thereof. The provisions of this paragraph shall not prevent the forfeiture of any such vessel or vehicle under any other provision of law.

SEC. 594. LIBEL OF VESSELS AND VEHICLES. [U. S. C. SUP. V, TITLE 19, SEC. 1594.]

Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same: *Provided,* That no vessel or vehicle used by any person as a common carrier in the transaction of business as such common carrier shall be so held or subject to seizure or forfeiture under the customs laws, unless it shall appear that the owner or master of such vessel or the conductor, driver, or other person in charge of such vehicle was at the time of the alleged illegal act a consenting party or privy thereto.

The Treaty with Great Britain dated May 22, 1924 (43 Stat. 1761), Article II, contains the following provisions:

(1) His Brittanic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examina-

tion show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

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BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and treaty involved	2
Statement	2
Summary of argument	8
Argument	10
Conclusion	53
Appendix A	54
Appendix B	58
Appendix C	62
Appendix D	68
Appendix E	72
Appendix F	74
Appendix G	76
Appendix H	78
Appendix I	81
Appendix J	83
Appendix K	88
Appendix L	93
Appendix M	99
Appendix N	102
Appendix O	108
Appendix P	111
Appendix Q	115
Appendix R	120

CITATIONS

Cases:

Abby, The, Fed. Cas. No. 14	13
Amaranth, The, 35 F. (2d) 872	46
Ann, The, 9 Cranch, 289	11
Apollon, The, 9 Wheat. 361	38
Bartram v. *Robertson*, 122 U. S. 116	36
Chew Heong v. *United States*, 112 U. S. 536	36
Church v. *Hubbart*, 2 Cranch, 187	37
Conejo, The, 16 F. (2d) 264	11
Croft v. *Dunphy*, 48 The Times L. R. 653	47
Cunard S. S. Co., Ltd., v. *Mellon*, 262 U. S. 100	20, 27

Cases—Continued.

	Page
Deauville, The, 49 F. (2d) 372	46
Dodge v. *United States*, 272 U. S. 530	11
Ford et al. v. *United States*, 10 F. (2d) 339; affirmed, 273 U. S. 593	12, 13, 30, 33, 35, 45
Frances Louise, The, 1 F. (2d) 1004, appeal dismissed, 270 U. S. 666	35
Gelston v. *Hoyt*, 3 Wheat. 246	11
Grace and Ruby, The, 283 Fed. 475	19
Hennings v. *United States*, 13 F. (2d) 74	36
Henry L. Marshall, The, 286 Fed. 260, affirmed, 292 Fed. 486, certiorari denied, 263 U. S. 712	20, 23, 28
Hudson v. *Guestier*, 6 Cranch 281	37
Idaho, The, 29 Fed. 187	13
Lewellen, The, Fed. Cas. No. 8307	13
Marjorie E. Bachman, The, 4 F. (2d) 405, appeal dismissed, 270 U. S. 666	35
Manchester v. *Massachusetts*, 139 U. S. 240	38
Marion Phillis, The, 36 F. (2d) 688	46
Maul v. *United States*, 274 U. S. 501	15
Merino, The, 9 Wheat. 390	11, 13
Metmuzel, The, 49 F. (2d) 368, certiorari denied, 283 U. S. 866	45
Miss C. B., The, 59 F. (2d) 744	46
Newton Bay, The, 30 F. (2d) 444, affirmed, 36 F. (2d) 729	46
Oklahoma v. *Texas*, 260 U. S. 606	14
Over the Top, The, 5 F. (2d) 838	35
Panama, The, 6 F. (2d) 326	45
Pescawha, The, 45 F. (2d) 221	45
Resolution, The, 30 F. (2d) 534	45
Richmond, The, 9 Cranch, 102	11, 38
Rosalie M., The, 12 F. (2d) 970	11
Sagatind, The, 4 F. (2d) 928, affirmed, 11 F. (2d) 673	35
Strong v. *United States*, 46 F. (2d) 257, dismissed, 284 U. S. 691	11
Taylor v. *United States*, 3 How. 197	11, 13
Throndyke, The, 53 F. (2d) 239	46
Underwriter, 13 F. (2d) 433, affirmed, *sub nom. Maul* v. *United States*, 274 U. S. 501	11
United States v. *Bowman*, 260 U. S. 94	38
United States v. *Cargo ex British Schooner Patara*, 40 F. (2d) 74	36
United States v. *Ferris*, 19 F. (2d) 925	36
United States v. *Larkin*, 208 U. S. 333	11
United States v. *Schouweiler*, 19 F. (2d) 387	36
United States v *63 Kegs of Malt*, 27 F. (2d) 741	46
United States v. *Story*, 294 Fed. 517	11
United States v. *Texas*, 162 U. S. 1	14

Cases—Continued. Page

Vinces, The, 20 F. (2d) 164, affirmed, 27 F. (2d) 296, *sub nom. Gillam* v. *United States*, certiorari denied, 270 U. S. 635 ---- 42, 45

Whitney v. *Robertson*, 124 U. S. 190 ---- 36

Wood v. *United States*, 16 Pet. 342 ---- 11

Statutes:

Tariff Act of 1922, 42 Stat. 858, 972, 979—

Sec. 581 ---- 54

Sec. 584 ---- 55

Sec. 585 ---- 56

Sec. 594 ---- 57

Tariff Act of 1930, 46 Stat. 590, 747, 748, 751—

Sec. 581 (U. S. C. Sup. V., Title 19, Sec. 1581) ---- 54

Sec. 584 (U. S. C. Sup. V., Title 19, Sec. 1584) ---- 55

Sec. 585 (U. S. C. Sup. V., Title 19, Sec. 1585) ---- 56

Sec. 594 (U. S. C. Sup. V., Title 19, Sec. 1594) ---- 57

Judicial Code—

Sec. 24 (U. S. C., Title 28, Sec. 41) ---- 10

Sec. 45 (U. S. C., Title 28, Sec. 106) ---- 11

Sec. 256 (U. S. C., Title 28, Sec. 371) ---- 10

Act 5, George I, ch. 11 (1718) ---- 50

Act. 9, George II, ch. 35 (1736) ---- 50

Act 3, George III, ch. 22 (1762) ---- 50

Act 6, George IV, ch. 105 (1825) ---- 51

Acts 3 and 4, William IV, ch. 53 (1833) ---- 51

Customs and Consolidation Act 1876, 39 and 40 Vict., ch. 36 ---- 51

Treaties:

Treaty with Great Britain dated May 22, 1924, 43 Stat. 1761 ---- 58

Treaty with France proclaimed March 12, 1927, 45 Stat. 2403 ---- 45

Miscellaneous:

Columbia Law Review (1923), 475 ---- 51

Columbia Law Review (1930) 521 ---- 36

Congressional Record, Vol. 62, Part II, 67th Cong., 2d Sess., p. 11593 ----

Crocker, *The Extent of the Marginal Sea* ---- 51

Dana's *Wheaton on International Law* (8th Ed.), 259 ---- 52

Fur Seal Arbitration, Vol. XIII, Sec. 1076, p. 298 ---- 52

Hall, *Foreign Jurisdiction of the British Crown*, pp. 244–245 ---- 52

Halleck: *International Law* (3d ed.), vol. 1, p. 157 ---- 52

Hyde: *International Law Chiefly as Interpreted by the United States*, vol. 1, p. 420 ---- 51

Oppenheim: *International Law* (4th ed.), vol. 1, p. 400 ---- 52

Phillimore: *International Law*, par. 198 ---- 52

Twiss, *The Law of Nations: Rights and Duties in Time of Peace* (2d Ed.), Sec. 190 ---- 52

Westlake, *International Law* (2d Ed.), Part 1, p. 176 ---- 52

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 82

FRANK COOK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 62–79) is reported in 51 F. (2d) 292. That of the Circuit Court of Appeals (R. 95–106) is reported in 56 F. (2d) 921.

JURISDICTION

The final decree of the Circuit Court of Appeals was entered March 18, 1932 (R. 106–107). A petition for a writ of certiorari was filed May 16, 1932, and granted on October 10, 1932. (R. 107.) Jurisdiction is conferred upon this Court by Sec-

tion 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Was the question whether the seizure of the vessel was made in violation of the Treaty of 1924 with Great Britain material in the forfeiture proceedings; and if so, was the objection to legality of the seizure waived by petitioner?

2. Did the Treaty of 1924 limit the right of the United States to seize British vessels under its laws prohibiting the importation of alcoholic beverages to those seized within one hour's sailing distance from the coast?

STATUTES AND TREATY INVOLVED

The pertinent provisions of the Tariff Act of 1930 and of the Treaty with Great Britain of May 22, 1924, are printed in Appendices A and B, *infra*, pages 54–61.

STATEMENT

Two libels of information in admiralty were filed by the United States in the District Court for the District of Rhode Island. The first (R. 1–5) was directed against the British Motor Screw *Mazel Tov,* and alleged that on the 1st day of November, 1930, the vessel was bound to the United States; that it had committed an offense against the laws of the United States prohibiting the importation of alcoholic beverages by conveying alcoholic liquors to the United States by itself and by vessels

other than itself, its speed and the speed of such other vessels being such that it and they could reach the coast of the United States by traversing the distance from the *Mazel Tov* to the coast within one hour; that on the 1st day of November, at a point about 9⅞ miles from the coast of Massachusetts, it was seized by the Commander of the United States Coast Guard Destroyer *Tucker,* who thereafter turned the vessel over to the Collector of Customs at the Port of Providence in the District of Rhode Island; and that before the filing of the libel the Collector had adopted the seizure and was then holding the vessel as forfeited to the United States for penalties imposed by Sections 584 and 585 of the Tariff Act of 1930. (*Infra,* pp. 55–57.)

The libel then set forth three causes for penalties. The first two were pleaded under Section 584 of the Tariff Act of 1930 (*infra,* p. 55), and the third under Section 585 of that Act (*infra,* p. 56). Violations of these sections subject the master of a vessel to certain penalties for the payment of which the vessel may be seized and proceeded against by libel, as provided in Section 594 of the Tariff Act of 1930 (*infra,* p. 57). The first cause for penalty alleged that the master had failed to produce a manifest when requested to do so by the Commander of the Coast Guard Destroyer; the second alleged that there was found on board of the vessel a cargo of distilled spirits not appearing on the manifest; and the third alleged that the vessel arrived from

a foreign port or place within the limits of a collection district and attempted to depart therefrom after having unloaded merchandise without making a report or entry under the provisions of the Tariff Act of 1930, the departure not being caused by stress of weather or other necessity.

The second libel was in all respects similar to the first except that it sought forfeiture of the unmanifested cargo of liquor pursuant to Section 584 of the Tariff Act of 1930. (R. 6–8.)

In accordance with the prayers of the libel, warrants and monitions issued in each case directing the United States Marshal to attach the vessel and cargo, to detain the same in his custody, and to give due notice to all persons claiming the vessel and cargo to show cause why the same should not be condemned and forfeited. (R. 8–11.) The return of the marshal upon each warrant and monition alleged that he had complied with the directions contained therein. (R. 9, 11.) A claim to the vessel was filed on behalf of the owner of the vessel by petitioner herein, who alleged that he was master and bailee thereof. This claim prayed that the owner of the vessel be permitted to appear and defend the action, and that the vessel, pursuant to the desire of the owner, be released on bond. (R. 11–12.) The record does not show that the owner ever otherwise appeared in the case. Following this claim appears an answer by petitioner which, after denying most of the allegations in the ship libel, contained the following paragraph (R. 14):

> The exception of Frank Cook, claimant of the British Motorship *Mazel Tov* in the above-entitled cause respectfully shows that said vessel was not seized within the territorial limits of any jurisdiction of the United States, but, on the contrary, was captured and boarded at a point more than four (4) leagues from the coast of the United States, and was not seized on any of the waters of the United States or within any collection district of the United States as alleged in said libel, and it was not the intention at any time to enter any of the territorial limits of the United States and that therefore this court has no jurisdiction sitting in admiralty in this matter.

A similar claim does not appear in the record in connection with the cargo, but the record does contain an answer which alleged that petitioner was consignee and claimant of the cargo, and which in every material respect was similar to that filed in response to the ship libel. (R. 14–16.) The two causes were consolidated for hearing, an oral motion was made by the claimant to dismiss the libels (R. 16), and testimony was taken (R. 16–61).

From the facts found by the District Court, as contained in its opinion and in separate findings of fact (R. 63–64, 85, 90), it appears that the British Motor Screw *Mazel Tov,* was discovered by the Coast Guard Destroyer *Tucker* within the four-league limit off the coast of Massachusetts on the evening of November 1, 1930. There was neither

proof nor finding as to the nationality of the owners of stock in the Mazel Tov Shipping Co., Ltd., the registered owner of the *Mazel Tov*. She was stopped and boarded by officers of the Destroyer at a point 11½ miles from the nearest land. The District Court found that the speed of the vessel was insufficient to propel her from the point of boarding to the shores of this country within an hour's sailing time. Upon demand the master of the *Mazel Tov* produced to the boarding officers a paper which the court found to be a manifest, but the officers discovered on board the vessel unmanifested liquor valued at $14,286.18, which had previously been cleared from St. Pierre. While the court found that the master of the vessel did not intend to approach nearer than four leagues to the coast of the United States, and that there was no evidence that it had either been in communication with our shores or had unladen any part of its cargo, the court said that the "circumstances compel the conclusion that the vessel was cruising about off our coast with the intent on the part of the master that ultimately the cargo would be taken to the United States by other boats." The vessel was seized and taken by the boarding officers to the Port of Providence, where she was turned over to the custom officials together with her cargo. Thereafter she was appraised and the master was notified that he had become liable to the penalties provided in Sections 584 and 585 of the Tariff Act of 1930.

In its decrees (R. 79, 81) the court dismissed both libels on the ground, as stated in its opinion (R. 62–79), that the seizure of the vessel and its cargo was in contravention of Section 3 of Article II of the Treaty with Great Britain of May 22, 1924. (See *infra*, p. 59.)

The United States appealed the cases to the Circuit Court of Appeals for the First Circuit, where they were consolidated for hearing. (R. 84–85.) That court reversed the decrees below and remanded the cases for further proceedings. (R. 95–100.) As to the validity of the seizure, the court held that the treaty did not in any way modify or abrogate the provisions of Section 581 of the Tariff Act of 1930, and therefore that the seizure was valid.

In passing upon the specific causes for penalty, the court sustained that alleged in the cargo libel and also the cause in the ship libel based upon the presence on the vessel of unmanifested cargo. No question was raised by the Government as to the cause for penalty based upon the failure of the master to produce a manifest, and the United States has not sought review of the adverse decision of the Circuit Court of Appeals in reference to the cause asserting a penalty against the vessel for departing from a collection district without report or entry. Accordingly, the only two causes before this Court are the causes relating to the possession of unmanifested cargo (the second cause stated in the ship libel and the single cause of the cargo libel).

SUMMARY OF ARGUMENT

I

Since, under authorities cited, a valid seizure is not a prerequisite to admiralty jurisdiction where the vessel has been seized on the high seas and brought within the jurisdiction of a District Court of the United States, the District Court in this case had jurisdiction of the proceedings brought to enforce the penalties and forfeiture against the vessel and its cargo. Accordingly, the question whether the seizure was proper under the Treaty of 1924 is immaterial.

Furthermore, if the validity of the seizure under the Treaty was material, that question was, like the question of venue, waived by the petitioner's failure to raise it properly.

II

Assuming that the question of validity of seizure under the Treaty was material and was properly raised in the District Court, there are three divergent views of the effect of the Treaty with Great Britain which are presented for the consideration of the Court.

(a) The court below held that the Treaty did not affect the provisions of the Tariff Acts of 1922 and 1930 because it referred only to laws prohibiting the importation of alcoholic beverages and the provisions of the Tariff Acts in question were not within that category.

(b) The Department of Justice has considered the Treaty of 1924 to be a limitation upon the right to search and seize vessels under the provisions of the Tariff Act of 1922. Its interpretation of the Treaty has relied primarily on the provisions of Section 3 of Article II. It has not regarded the reenactment of the pertinent provisions of the Tariff Act of 1922 in the Tariff Act of 1930 as affecting the limitation of the Treaty.

(c) Other lawyers for the Government contend that the result reached by the court below was correct. They assert that prior to the Treaty the United States was insisting upon its right to exercise authority upon vessels engaged in smuggling liquor within twelve miles of the coast and that Great Britain was insisting that her vessels outside of territorial waters but within the twelve mile limit were not subject to the authority of the United States. It is argued that neither the United States nor Great Britain surrendered claims of sovereign right in the Treaty and that Great Britain merely waived its right to protest seizures beyond the three mile limit in a limited class of cases in return for which her vessels were permitted to transport intoxicating liquors within territorial waters. The right of the United States to proceed under municipal legislation therefore remains unaffected by the Treaty. Reenactment of the provisions of the Tariff Act of 1922 in the Tariff Act of 1930 shows that this view is correct.

This construction of the Treaty is desirable in order to foster the making of such agreements in the interest of peace and to promote the orderly development of international law. Any other construction is unworkable and apparently one-sided. The right asserted by the United States prior to the Treaty is recognized by many authorities, and various authorities support the construction of the Treaty which is urged.

ARGUMENT

I

Petitioner contends that the vessel and its cargo were not subject to forfeiture because they were seized in violation of the Treaty of 1924 with Great Britain. This raises two preliminary questions, (1) whether a valid seizure was prerequisite to the decrees of forfeiture, and (2) if it was, whether the point was waived because not raised by petitioner prior to the filing of petitioner's answers on the merits in the trial court.

Under Section 24 of the Judicial Code, paragraphs 3 and 9 (U. S. C., Title 28, Sec. 41), the District Courts of the United States have original jurisdiction "Of all civil causes of admiralty and maritime jurisdiction," with certain exceptions not here material, and "Of all suits and proceedings for the enforcement of penalties and forfeitures incurred under any law of the United States." Section 256 of the Judicial Code (U. S. C., Title 28, Sec. 371) makes this jurisdiction exclusive. It is

evident that the District Courts have jurisdiction of cases falling within these categories because of the nature or subject matter of the proceeding. See *United States* v. *Larkin*, 208 U. S. 333. Venue is defined by Section 45 of the Judicial Code (U. S. C., Title 28, Sec. 106), which provides that "Proceedings on seizures made on the high seas, for forfeiture under any law of the United States, may be prosecuted in any district into which the property so seized is brought and proceedings instituted. Proceedings on such seizures made within any district shall be prosecuted in the district where the seizure is made, except in cases where it is otherwise provided."

Under these and similar earlier statutes it has long been held that a libel for forfeiture must allege a seizure which has not been abandoned but that the seizure need not be valid to sustain the jurisdiction. See *The Richmond*, 9 Cranch 102; *The Ann*, 9 Cranch 289, 291; *Gelston* v. *Hoyt*, 3 Wheat. 246, 310; *The Merino*, 9 Wheat. 390, 402–403; *Wood* v. *United States*, 16 Pet. 342, 359; *Taylor* v. *United States*, 3 How. 197, 205, 206; *Dodge* v. *United States*, 272 U. S. 530. See also *Strong* v. *United States*, 46 F. (2d) 257, 260–261 (C. C. A. 1st), dismissed pursuant to stipulation, 284 U. S. 691; *The Conejo*, 16 F. (2d) 264, 265 (C. C. A. 1st); *The Underwriter*, 13 F. (2d) 433, 434 (C. C. A. 2d), affirmed on other grounds *sub nom. Maul* v. *United States*, 274 U. S. 501; *The Rosalie M.*, 12 F. (2d) 970, 971 (C. C. A. 5th); *United States* v. *Story*, 294 Fed. 517, 519 (C. C. A. 5th).

As indicated by the above decisions, there are two reasons for this—the question concerns the venue; and the United States by filing its libel for forfeiture may ratify what would otherwise have been an illegal seizure. Now, it is clear that the Treaty with Great Britain did not in any way change or modify any law of the United States prescribing penalties and forfeitures. It related merely to the arrest of persons and the seizure of property suspected of offending against the laws designed to prevent the smuggling into this country of intoxicating liquor. (*Ford* v. *United States*, 273 U. S. 593.) The seizure, if contrary to the Treaty, could not relieve the District Court of the duty to determine whether the *res* had offended against a law of the United States and to condemn the *res* as forfeited. That the Government made out a case for forfeiture under the provisions of the Tariff Act of 1930 does not seem to be disputed. We submit, therefore, that the alleged illegality of the seizure presented no obstacle to the decrees condemning the vessel and its cargo as forfeited.

As we have indicated, causes for the penalties incurred which were enforcible against the vessel and the forfeiture of her unmanifested cargo are matters quite distinct from the validity of her seizure. The penalties and forfeiture were incurred and the vessel was seized upon the high seas. She was brought into Providence and libeled in the District Court for the District of Rhode Island. The District Court therefore had jurisdiction of

the proceedings brought to enforce the penalties and the forfeiture. The claimant appeared generally and did not question the court's jurisdiction or reserve any rights under the Treaty to object on the ground that the vessel and her cargo were not properly subject to the jurisdiction of the court. Instead of questioning the power of the court to consider the causes of penalties and forfeiture alleged in the libels the claimant filed answers which made defense upon the merits of the case. By so doing, it would seem that he waived the right, if any was afforded to him under the Treaty, to object that the court was without jurisdiction to enforce the penalties against the vessel and forfeit her cargo in accordance with the statutory mandate. See *The Merino,* 9 Wheat. 390, 400–401, *supra; Taylor* v. *United States,* 3 How. 197, 205, *supra; Ford* v. *United States, supra,* p. 606; *The Idaho,* 29 Fed. 187, 192 (Ore.); *The Lewellen,* Fed. Cas. 8307 (Ind.); *The Abby,* Fed. Cas. No. 14 (Mass.).

The fact that the Government's libels alleged that the *Mazel Tov,* on the date of seizure, was committing or attempting to commit an offense against the United States within the distance from shore specified in the Treaty did not save the question for petitioners. There was no allegation that the vessel was *seized* within the Treaty limit. Nor did the petitioner save the question by the exception set forth in his answers. In neither case was any infringement of Treaty rights complained of, the point made in each case being that the libeled prop-

erty "was not seized within the territorial limits of any jurisdiction of the United States, but, on the contrary, was captured and boarded at a point more than four (4) leagues from the coast of the United States."

II

If the question of the legality of the seizure of the *Mazel Tov* is material and was properly raised in the District Court, it becomes necessary to consider the effect of the Treaty of 1924 between the United States and Great Britain (see Appendix B, *infra,* p. 58) upon the provisions of the Tariff Act of 1922, and the effect of the Tariff Act of 1930 upon the Treaty. There are at least three possible and divergent views of the relation between the Treaty of 1924 and the customs provisions of the Tariff Acts. As the question is of international importance, we shall endeavor to state these divergent views fully and fairly and submit the question to the Court for its determination. Before doing so a brief review of the background of the Tariff Acts and the Treaty may prove helpful.[1]

Since the Act of August 4, 1790, 1 Stat. 145, Congress has granted authority to board and search foreign as well as American inbound vessels within four leagues of the coast of the United States.

[1] Negotiations and diplomatic correspondence preceding a treaty may be considered in determining the object of the parties. See *United States* v. *Texas*, 162 U. S. 1, 29; *Oklahoma* v. *Texas*, 260 U. S. 606.

(See *Maul* v. *United States*, 274 U. S. 501, concurring opinion of Mr. Justice Brandeis, p. 521.) Authority to seize foreign vessels beyond the territorial limits of the United States for violation of its laws was not in terms conferred until the Tariff Act of 1922 in respect to any offense, except in a few instances in which Congress pursuant to specific treaties provided that any vessel, foreign or American, might be seized.[2] (See *Maul* v. *United States, supra*, p. 507 and p. 521.)

Section 581 of the Tariff Act of 1922, 42 Stat. 858, 979 (see Appendix A, *infra*, p. 54), continued the right of search and authorized the seizure of any vessel within four leagues of the coast for violation of any law of the United States which subjected the vessel or its cargo to forfeiture. While the committee reports throw no light upon the reason for the extension of the right to seize beyond territorial waters, the debates indicate that the purpose of the change was to facilitate enforcement of the National Prohibition Act. (See Congressional Record, Vol. 62, Part 11, 67th Cong., 2d Sess., p. 11593.)

On June 26, 1922, the Secretary of State addressed a note to the British Ambassador suggesting cooperation on the part of British and Ameri-

[2] Various statutes authorizing the search and seizure of vessels are discussed in *Maul* v. *United States, supra*. Although the Court was there considering the right to search and seize American vessels, apparently no distinction is made in these enactments expressly excluding foreign vessels from their terms.

can authorities with regard to the smuggling of liquor. The serious difficulties of enforcement of the laws of the United States upon this subject were outlined, and the note concluded as follows (see Appendix C, *infra*, p. 62):

> While existing nefarious practices might be largely stopped by appropriate precautionary measures with respect to the issuance of British registries to vessels engaged in smuggling and with respect to the issuance of clearance papers to such vessels, the situation with which the authorities of this Government are confronted has become so serious that this Government feels prompted to inquire whether your Government would be disposed to enter into a treaty for the purpose of checking the illegal practices in question. Such a treaty might contain reciprocal provisions authorizing the authorities of each Government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters to the extent of twelve miles from the shore. It would appear that no inconvenience would be experienced as a result of the exercise of such a right by vessels engaged in legitimate trade between Nassau and Halifax. It is evidently natural for such vessels to take a direct route to Hatteras and then a direct course to Diamond Shoal Lighthouse and from thence to Halifax. Apparently this course brings vessels at no point within four leagues of the American shore. I shall be glad if you will bring the contents of this communication to the attention of your Gov-

> ernment, which I have no doubt will appreciate the serious considerations which prompt the request that the matters therein presented receive earnest consideration at the earliest convenient time.

To this note the British Ambassador replied on October 13, 1922, outlining the steps already taken for cooperation with the American authorities in an attempt to prevent the smuggling of liquor, and concluding as follows (see Appendix D, *infra*, p. 68):

> His Majesty's Government had thus taken steps even before the receipt of representations from the United States Government to prevent the practices, to which attention has now been drawn. They have now, as already indicated, issued supplementary instructions in the matter, and hope that the measures taken will prove successful in preventing any breaches of the local law. They feel, however, more difficulty in accepting the proposal that a treaty should be made authorising the authorities of each government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters up to a distance of twelve miles from the shore. His Majesty's Government have consistently opposed any extension of the limit of territorial waters such as that now suggested. They feel that the outbreak of smuggling which has led to the proposal can not be regarded as a permanent condition, but as one which will no doubt be sup-

pressed by the United States authorities within the not distant future. While, therefore, they are desirous of assisting the United States Government to the best of their ability in the suppression of the traffic and in the prevention of the abuse of the British flag by those engaged in it, they do not feel that they can properly acquiesce, in order to meet a temporary emergency, in the abandonment of a principle to which they attach great importance.

In communicating the above to you I am directed to add that while His Majesty's Government are, as already indicated, unable to acquiesce in the proposed treaty for the extension of territorial waters, they are nevertheless most desirous of taking any steps within their power to prevent any infractions of the local law by persons engaged in liquor smuggling.

Immediately following the enactment of the Tariff Act of 1922 and, perhaps in some few cases just before its enactment, British vessels had been seized by the United States beyond the three-mile limit. Protests were lodged by the British Government against these seizures, and a number of the vessels were released by direction of the American authorities.[3] Under date of November 9, 1922, the Secretary of the Treasury addressed a communication to the Collector of Customs at New York au-

[3] In a communication from the Secretary of State to the American Chargé d'Affaires ad interim in London, dated

thorizing the release of all foreign vessels seized outside the three-mile limit where the vessels were not communicating with the shore by means of their own boats or equipment. (See Pet. Br., pp. 15–16.)

On December 30, 1922, following the decision in *The Grace and Ruby,* 283 Fed. 475 (Mass.), decided September 18, 1922, the British Ambassador addressed a note to the Secretary of State (see Appendix E, *infra,* p. 72), concluding as follows:

> In order to avoid the possibility of any misunderstanding, I am desired by my Government to make it clear that His Majesty's Government are unable to acquiesce in what they understand to be the ruling of the United States Government, namely, that foreign vessels may be seized outside the three-mile limit if it can be shown that they have established contact with the shore for illegal purposes by means of their own small boats. My Government must reserve their right to lodge a protest in any individual case in which action may be taken by the United States Government under this ruling.

August 25, 1923, after referring to various authorities on international law, it was said with respect to these vessels:

"Although these statements furnished grounds for the contention that the seizure outside the three-mile limit of British ships engaged in smuggling liquor was proper, nevertheless this Government in the desire to avoid controversies with respect to cases of a doubtful character has acquiesced in requests submitted by the British Embassy for the release of certain British vessels."

To this note the Secretary of State replied on January 18, 1923, stating, in effect, that the conclusion had been reached that the Government of the United States should adhere to the position that foreign vessels outside the three-mile limit may be seized when it is established that they are using their small boats in illegal operations within the three-mile limit. (See Appendix F, *infra,* p. 74.)

On April 30, 1923, this Court decided *Cunard S. S. Co. Ltd.* v. *Mellon,* 262 U. S. 100, holding that the National Prohibition Act applied to all merchant vessels, foreign or domestic, within the territorial waters of the United States, and that the carrying of intoxicating liquors as sea stores through the territorial waters or into the ports and harbors of the United States by such vessels is forbidden by the Eighteenth Amendment and the National Prohibition Act.

Following the decision in *The Henry L. Marshall,* 286 Fed. 260 (S. D. N. Y.), affirmed 292 Fed. 486 (C. C. A. 2d), certiorari denied, 263 U. S. 712, on July 10, 1923, the British Chargé d'Affaires ad interim addressed a note to the Secretary of State (see Appendix G, *infra,* p. 76), concluding as follows:

> In order to avoid the possibility of any misunderstanding on the part of the United States Government as to His Majesty's Government's attitude in this matter I have the

> honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform you that any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by His Majesty's Government as creating a very serious situation. In regard to the *Henry L. Marshall case,* I have been instructed to explain that the absence of a protest by His Majesty's Government against the condemnation of this vessel in no way implies any alteration in the views of His Majesty's Government with regard to the principle at stake, inasmuch as that vessel, owing to the circumstances in which she secured her British registry, was not recognized by His Majesty's Government as entitled to British registry. Consequently, His Majesty's Government have not felt called upon to assert the principle at stake on her behalf, since, as far as His Majesty's Government are concerned, the *Henry L. Marshall* remains an American vessel.

Previously, about June 11 or 12, 1923, a draft of a proposed treaty had been submitted to Great Britain (as well as to France, Italy, Japan, and Spain.) (See Appendix H, *infra,* p. 78.) This draft provided for searches and seizures within twelve geographical miles from the coasts of the parties, without, however, extending territorial waters. It also provided that articles the importa-

tion of which into the territories of either of the contracting parties are prohibited might be brought within the territorial waters as sea stores if properly sealed.

Under date of July 14, 1923, the British Chargé d'Affaires advised the Secretary of State that Lord Curzon, when questioned in Parliament, had stated that the British Government could not accept the proposed treaty. The memorandum in which this communication was contained also states (see Appendix I, *infra*, p. 81):

> In the opinion of Lord Curzon Mr. Hughes' proposed treaty would not provide for any immediate remedy for the present difficulties, seeing that it could not be ratified until Congress meets, when an amendment to the Volstead Act could equally well be introduced if the United States Government so desired. Moreover, even if the twelve-mile limit were accepted, cases would inevitably occur liable to cause serious friction between two countries, owing to the difficulty of deciding with any certainty the position of a limit usually out of sight of land, at any rate on the Atlantic coast.
>
> Lord Curzon adds that the Hovering Acts in the United Kingdom were entirely superseded by the Customs Consolidation Act, 1876, by which British municipal legislation is made to conform with international law.

Under date of July 16, 1923, the Secretary of State replied to the communication of the British

Chargé d'Affaires of July 10, 1923. (See Appendix J. *infra*, p. 83.) After referring to the decision of the Circuit Court of Appeals in the *Henry L. Marshall*, 292 Fed. 486, *supra*, the Secretary of State continued:

> The United States Circuit Court of Appeals concluded: (a) that there was an attempt to introduce all of the *Marshall's* cargo into the commerce of the United States, and that there was an actual introduction of a part of that cargo into that commerce; (b) that such attempt at introduction was by means of fraudulent practices, i. e., evasion of the provisions of the National Prohibition Act; (c) that there were wilful acts (i. e., rum running) by means whereof the United States was deprived of duties upon the merchandise (i. e., whiskey) affected by the said act.
>
> * * * * *
>
> In view of this decision, and of the tenor of your communication, my Government hopes that it may be advised that His Majesty's Government does not consider, even in the case of a vessel admittedly of valid British registry, that such a vessel pursuing the course of conduct followed by the schooner *Henry L. Marshall* is making proper use of the British flag and that His Majesty's Government would not be disposed to espouse the cause of a British merchant vessel in an effort unlawfully to introduce intoxicating

liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall*, or in such a case to oppose the enforcement of the laws of the United States by means of the procedure taken in the case of that vessel and judicially approved.

On July 19, 1923, the Secretary of State replied to the memorandum from the British Chargé d'Affaires dated July 14, 1923, suggesting further negotiation in connection with the proposed treaty. (See Appendix K, *infra*, p. 88.) In this note the Secretary of State said:

> It may confidently be asserted that there would be no disposition on the part of the American authorities, and the special agreement would not justify any attempt, to seize a British vessel, save within the limits proposed, and when it was clear that the vessel concerned was directly involved in an attempt to introduce its illicit cargo into the territory of the United States.[4] British vessels bound for the ports of the United States would encounter no additional obstacles to their trade, and vessels destined for foreign ports, which happened to pass on legitimate errands within twelve miles of the American coast, would suffer no incon-

[4] This statement was made when the limits of the proposed treaty were coextensive with the limits of the application of Section 581 of the Tariff Act of 1922. It had no reference to the provisions in the treaty as concluded.

venience, while such vessels as were engaged in the unlawful conduct above described would not be able to create difficulties between the two countries, much less serious friction, by attempts to secure immunity for their operations by invoking the protection of the British flag.

Although the Government of the United States regards the proposed agreement as an appropriate setting forth of the proposal, it would cordially welcome the cooperation of the British Government in moulding the form of an arrangement which would reasonably serve a purpose which, it is firmly believed, may be found to be common to both countries.

In reply to the note of July 19, 1923, the British Chargé d'Affaires ad interim advised the Secretary of State on September 17, 1923, in part as follows (see Appendix L, *infra*, p. 93):

In face of this authoritative pronouncement Lord Curzon feels additional hesitation in accepting proposals which, with all due respect to Mr. Hughes, can not, in Lord Curzon's opinion, fail to weaken the authority of the general rule of international law, whereby three miles is regarded as the limit of territorial jurisdiction. Moreover, the Atlantic coast line of the United States, except the small part between Portland [Maine] and the Bay of Fundy, is so low that it is not as a rule visible twelve miles

out at sea; the difficulty of deciding the exact position of the proposed new limit would in consequence be much increased, and there would be a constant risk of disputes arising between the two countries whenever a British ship was boarded or arrested by the United States preventive service, on or near the new line. In this connection Lord Curzon would observe that the ancient British Hovering Acts were modified in 1876 to bring them into harmony with the principles of international law, and His Majesty's Government can not admit that the municipal legislation of any country can override those principles.

* * * * *

His Majesty's Government do not deny the strictly legal right of the United States or any other country to impose its jurisdiction on all ships, whether national or foreign, within its territorial waters.

The British Chargé d'Affaires ad interim on October 29, 1923, advised the Secretary of State that the Imperial Conference had appointed a special committee to consider the question of prohibition and liquor smuggling through United States territorial waters and that on the conclusion of the Conference's consideration the British Government would be in a position to make a definite proposal to the Government of the United States generally favorable to their interest in the suppression of the

liquor traffic. This communication was acknowledged by the Secretary of State on November 2, 1923.

In a note dated November 23, 1923, the British Chargé d'Affaires ad interim referred to the decision of this Court in *Cunard S. S. Co., Ltd.*, v. *Mellon, supra,* and stated that before proceeding with a proposed treaty the British Government wished to have assurance that the provisions of the treaty authorizing the introduction of liquor as ships' stores within the territorial waters of the United States would be valid. (See Appendix M, *infra,* p. 99.)

On November 26, 1923, the Secretary of State replied, advising the British Government of the view of the Government of the United States that the treaty proposed was within the constitutional power of Congress. (See Appendix N, *infra,* p. 102.)

On December 3, 1923, the British Chargé d'Affaires ad interim left with the Secretary of State a draft of treaty, prepared by the British Government, which provided in Section 2 (2) that the right of search and seizure conferred should not be exercised at a greater distance from the coast of the United States than can be traversed in one hour by the suspected vessel. (See Appendix O, *infra,* p. 108.)

In an aide-memoire of December 7, 1923 (see Appendix P, *infra,* p. 111), prepared by the Secre-

tary of State and handed to the British Chargé d'Affaires, following submission of the draft of treaty proposed by the British Government, it is said:

> While the Government of the United States would have preferred that the distance for the purposes of search and seizure be more definitely delimited, it has been concluded, in view of the evident desire of the British Government to attain the object in view and of the importance of an early disposition of the matter, not to raise objections to the provisions contained in Articles 2, 4, and 5 of this draft, save to add the words ", its territories or possessions" after the words "United States" in Article 2.

The memorandum then makes certain suggestions for modification which are not material for present purposes.

Under date of January 2, 1924, the British Chargé d'Affaires ad interim addressed a communication to the Secretary of State in connection with the seizure of the *Tomoka* (see Appendix Q, *infra,* p. 115), and in the course of that communication the Secretary of State was asked for an authoritative statement as to the present policy of the United States with respect to seizure of foreign vessels outside of the three-mile limit, and the note also refers to the fact that the absence of a protest by the British Government in the case of the *Henry L. Marshall* (see *supra* p. 20) did not indicate acquiescence in seizure outside territorial waters.

The Secretary of State replied to this note on January 22, 1924 (see Appendix R, *infra*, p. 120). Before discussing the *Tomoka* case the Secretary of State referred to his note of July 16, 1923 (see *supra*, p. 22, and Appendix J, *infra*, p. 83), saying:

> It is far from my purpose to enter into a detailed review of the correspondence with your Embassy concerning the several cases of seizure which have arisen. I would merely advert briefly to certain facts which, it is believed, suffice to explain the position of my Government:
>
> First. I endeavored to state succinctly the principles on which my Government has asserted rights of seizure and condemnation in my note to your Embassy of July 16, last, concerning the case of the *Henry L. Marshall*.
>
> Secondly. The desire which I expressed in the last paragraph of that note for an indication of the disposition of His Majesty's Government as to the espousal of the cause of a British merchant vessel engaged in an effort unlawfully to introduce intoxicating liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall* has, as yet, met with no response on the part of His Majesty's Government.

The proposed treaty was signed on January 23, 1924, ratifications were exchanged, and the Treaty

was proclaimed by the President on May 22, 1924 (43 Stat. 1761).[5]

This Court referred to the Treaty in *Ford* v. *United States*, 273 U. S. 593, as follows (p. 609):

> The treaty indicates a considerate purpose on the part of Great Britain to discourage her merchant ships from taking part in the illicit importation of liquor into the United States, and the further purpose of securing without objection or seizure the transportation on her vessels, through the waters and in ports of the United States, of sealed sea stores and sealed cargoes of liquor for delivery at other destinations than the United States. The counterconsideration moving to the United States is the enlargement and a definite fixing of the zone of legitimate seizure of hovering British vessels seeking to defeat the laws against importation of liquor into this country from the sea. The treaty did not change the territorial juris-

[5] Similar treaties were negotiated with other countries as follows:

Foreign government	Effective date	Where found
Norway	July 2, 1924	43 Stat. 1772.
Denmark	July 25, 1924	43 Stat. 1800.
Germany	August 11, 1924	43 Stat. 1815.
Sweden	August 18, 1924	43 Stat. 1830.
Italy	October 22, 1924	43 Stat. 1844.
Panama	January 19, 1925	43 Stat. 1875.
Netherlands	April 8, 1925	44 Stat. 2013.
Cuba	June 19, 1926	44 Stat. 2395.
Spain	November 17, 1926	44 Stat. 2465.
France	March 12, 1927	45 Stat. 2403.
Belgium	January 11, 1928	45 Stat. 2456.
Greece	February 18, 1929	45 Stat. 2736.
Japan	January 16, 1930	46 Stat. 2448.
Poland	August 8, 1930	46 Stat. 2773.
Chile	November 26, 1930	46 Stat. 2852.

> diction of the United States to try offenses against its importation laws. That remained exactly as it was.

The Tariff Act of 1930, 46 Stat. 590, in Section 581 reenacted verbatim Section 581 of the Tariff Act of 1922. See Appendix A, *infra*, p. 54.) There is no reference in the committee reports or the debates to the Treaty of 1924.

We are informed by the Department of State that no protest or claim of immunity has been filed by the British or Canadian Governments in connection with the seizure of the *Mazel Tov*.

A

The Circuit Court of Appeals, in reversing the decision of the District Court, held that the Treaty of 1924 did not repeal or abrogate the clause fixing a four-league zone in the Federal customs and revenue laws, and, therefore, that the validity of the seizure of the *Mazel Tov* beyond the treaty limits but within four leagues of the coast was not affected by the provisions of the Treaty. In this connection the court below said (R. 103):

> There is nothing in Article II or its subdivisions showing that the United States was undertaking to acquire any right or privilege as to the enforcement of its customs-revenue laws as exemplified in Sections 581 and 584 of the Tariff Act of 1922, which are

the same as the like numbered sections in the Tariff Act of 1930, and contain provisions such as have been a part of every tariff act passed by Congress beginning with the Act of 1790 (1 Stat. 145), which introduced the four-league limit (s. 31, p. 164) of the British hovering statutes. See 9 George 2d, C. A. P. 35 (1736); *Arch* v. *United States,* 13 F. (2d) 382. Neither the Tariff Act of 1922 nor of 1930 prohibits the importation of alcoholic beverages. Sections 581 and 584 clearly do not prohibit their importation and consequently it can not reasonably be said that the High Contracting Parties in Article II of the treaty were undertaking to or did there stipulate with reference to our customs revenue laws, and particularly Sections 581 and 584 containing provisions which had been embraced in the customs-revenue statutes of this government since its foundation and which did not prohibit importation of alcoholic liquors. *Gilliam* v. *United States,* 27 Fed. (2d) 296, 300, 301; *Miller* v. *United States,* 49 Fed. (2d) 368, 369; certiorari denied in 283 U. S. 866.

The fact that Congress in 1930 reenacted Sections 581 and 586 of the Tariff Act of 1922, without change, each of which sections contained the "four leagues of the coast" provision, is practically conclusive evidence that Congress did not regard or understand that these sections of the Act of 1922 were amended by the treaty.

> Having reached the conclusion that the treaty of 1924 did not repeal or abrogate the clause fixing a four-league zone in our customs revenue laws (including Section 581), the next question is, whether the *Mazel Tov* may be charged with the payment of the penalty of $14,286.18 assessed against the master for having on board merchandise not included or described in the vessel's manifest.

The opinion does not discuss the decision of this Court in *Ford* v. *United States, supra,* 273 U. S. 593, in which this Court said (at pp. 618–619):

> Considering the friendly purpose of both countries in making this treaty, we do not think any narrow construction should be given which would defeat it. The parties were dealing with a situation well understood by both. In effect they wished to enable the United States better to police its seaboard by enabling it, within an hour's sail from its coast beyond its territorial jurisdiction and on the high seas, to seize British actual or would-be smugglers of liquor and, if they were caught, to proceed criminally against them as if seized within the three-mile limit for the same offenses, in reference to liquor importation. No particular laws by title or date were referred to in the treaty but only the purpose and effect of them. Plainly, it was the purpose of the contracting parties that vessels and men who are caught under the treaty and are proven

Hennings v. *United States*, 13 F. (2d) 74 (C. C. A. 5th); *United States* v. *Ferris*, 19 F. (2d) 925 (N. D. Cal.); *United States* v. *Schouweiler*, 19 F. (2d) 387 (S. D. Cal.); *United States* v. *Cargo ex British Schooner Patara*, 40 F. (2d) 74 (E. D. N. Y.). After the passage of the Tariff Act of 1930 in which Section 581 of the Tariff Act of 1922 was reenacted verbatim, the Department continued to follow this construction of the Treaty.[8] The view of the Treaty taken by the Department of Justice is in accord with that of the District Court in this case. If that view is correct and if the question of the legality of the seizure is material and was properly raised in the District Court, the judgment of the court below should be reversed.

C

Lawyers for the Government other than those employed in the Department of Justice take a different view of the Treaty in its relation to the Tariff Acts of 1922 and 1930. In their view the result reached by the court below was correct.

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[8] When a treaty and a Federal statute conflict an attempt to give effect to both will be made. *Bartram* v. *Robertson*, 122 U. S. 116. If there is a clear conflict the latest in point of time controls. *Whitney* v. *Robertson*, 124 U. S. 190. But this Court will not disregard a treaty's terms, because of subsequent legislation, unless compelled to do so by language so pointed as to leave no doubt that such was the objective of Congress. *Chew Heong* v. *United States*, 112 U. S. 536. See 30 Columbia Law Rev. 521 (1930).

The contention is that the Treaty of 1924 was not a limitation upon the right to search and seize British vessels within the twelve-mile limit, but was an extension of the right always conceded by Great Britain to seize and search vessels within the three-mile limit so as to permit seizures beyond the territorial waters of the United States, provided the vessel was within one hour's sailing distance of the coast; that there was no intention on the part of the United States or Great Britain to surrender claims of sovereign right, except that Great Britain waived its right to protest seizures beyond the three-mile limit in a very limited number of cases defined in the Treaty, in return for which her ships were permitted to transport intoxicating liquors within the territorial waters of the United States as part of their stores.

Under this construction of the Treaty, if the search and seizure takes place beyond treaty limits, but within the twelve-mile limit provided in our customs laws, the Treaty would have no application and the rights of the United States and of the offending ship would be unaffected by it. Conclusion would then follow that the search and seizure in this case was lawfully made pursuant to the provisions of the Tariff Acts, and decision would be controlled by cases decided in this Court which recognize the right of a nation to exercise authority beyond the three-mile limit. *Church* v. *Hubbart,* 2 Cranch, 187; *Hudson* v. *Guestier,* 6 Cranch,

281; *The Richmond* v. *United States*, 9 Cranch, 102, Cf. *The Apollon*, 9 Wheat. 361; *Manchester* v. *Massachusetts*, 139 U. S. 240, 258; *United States* v. *Bowman*, 260 U. S. 94. According to this theory the Treaty is a mere renunciation by Great Britain of all right to question the validity of seizures within treaty limits, but was not intended to affect the asserted right of the United States to search and seize foreign vessels within four leagues of its coast.

The fact that the Treaty was carefully limited to ships engaged in liquor violations lends force to this view. The diplomatic correspondence discloses that both nations were quite insistent in declining to qualify or surrender their conflicting contentions. Great Britain insisted that there could be no right of search and seizure beyond three miles from the coast. The United States insisted that such rights could lawfully be exercised within twelve miles of its coast. Obviously the Treaty was not intended, on either side, to compromise these conflicting views. The Tariff Acts remained in force and continued to be an assertion of the power which Great Britain was disputing. Thus it is said that the contracting governments wished to find a *modus operandi* rather than a definitive solution of their differences of opinion upon a disputed question of international law, and that their purpose was to remove from the realm of conflict the cases in which Great Britain was willing to forbear protest, all other cases being left open to discussion

and adjustment between the two countries when they should arise.

This, it is argued, the Treaty accomplished by His Britannic Majesty's agreement to raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters in the limited class of cases defined in the Treaty. Such provision, it is said, characterizes the Treaty, not as a limitation or definition of rights, but as an agreement to forbear the assertion of rights in particular cases. There are reasons of policy which favor this interpretation. The making of such conventions between nations is to be commended. It is as if neighbors, in a friendly spirit, were to agree that while disputable questions involving a general principle might arise and be the subject of future discussion and adjustment between them, certain cases should be removed from the realm of their dispute so as to avoid the probability of immediate and serious controversy without the surrender of principle upon either side. Such conventions between nations are desirable in the interests of peace and should be encouraged. If interpreted as a surrender of rights contended for by either party in cases which are not expressly covered by the terms of the agreement, the making of such conventions will be fraught with danger to both, and resort to this sensible method of preserving friendly relations will be discouraged.

With these considerations in mind, it is argued that the right of the United States to board a for-

eign vessel and to inquire as to violations of the customs laws has existed almost from the beginnings of the Government; that the legislation in the Tariff Acts of 1922 and 1930 is an assertion of control over waters adjacent to our shores exercised from the beginning; that it is therefore not lightly to be assumed that this Government, in 1924, intended to abandon this policy; that the Treaty in terms expresses no such intention, and is so drawn as merely to express the agreement of His Britannic Majesty to raise no objection to this policy when applied in particular cases, and that by its reenactment of the provisions of the Tariff Act of 1922 in the Tariff Act of 1930 Congress showed that it did not regard the Treaty as a limitation upon this policy.

The interpretation of the Treaty as a limitation upon the asserted right of visitation, search, and seizure of vessels results in an immunity of vessels carrying liquor which was quite contrary to the purpose of the Treaty to make more effective the enforcement of the laws of the United States prohibiting the importation of intoxicating liquors. With respect to all other vessels the asserted right of the United States to visit, search, and seize within the twelve-mile limit was unaffected by the Treaty. The limitation upon the right with respect to vessels engaged in the liquor traffic, if any was intended by the Treaty, was dependent upon the speed of the vessel, a fact which can not be ascertained in advance of visitation and search

unless she be under way and at full speed when observed by the revenue officers. Nor can it be ascertained, prior to boarding the vessel, whether she is engaged in carrying liquor, and is therefore subject to visitation and search only if capable of a certain speed, although if not engaged in such traffic she would be subject to visitation, search, and seizure for violation of the customs laws, regardless of her speed. Such results are quite unreasonable and should not be presumed to have been intended. Obviously, the only practical way to have dealt with this problem was for the United States to continue to exercise the right of visitation and search in all cases covered by the statute, Great Britain retaining the right to object in all cases where after visitation and search the facts should disclose that the case was not within the Treaty, either because the vessel was not violating any liquor law or, if she was, was not seized within treaty limits.

The consideration moving to Great Britain was the right to transport liquors within the territorial waters of the United States, as provided in Article III. The only consideration moving to the United States was the agreement of Great Britain not to object to the visitation, search, and seizure of British vessels within the treaty limits. If, in agreeing not to object, Great Britain imposed a limitation upon the right of visitation, search, and seizure asserted by the United States with respect to all vessels within twelve miles of its shore, the arrange-

ment was quite unworkable and did not serve the purpose sought to be accomplished.

The rights asserted by the United States find ample support in international law and in the practices of maritime nations, including the practices of Great Britain, until 1876. (See pp. 47–52, *infra.*) If in agreeing not to protest against the exercise of rights recognized under the law of nations Great Britain imposed a limitation upon their exercise, and at the same time procured for British ships the right to transport intoxicating liquors within the United States, the treaty appears one-sided. It is therefore more reasonable to construe the provisions of Article II not as a limitation upon the asserted rights of the United States, but merely as an agreement on the part of Great Britain not to object to the assertion of such rights in certain cases. This results in a fair and workable arrangement.

Several decisions are referred to as supporting this view. In *The Vinces,* 20 F. (2d) 164 (E. D., S. C.), affirmed 27 F. (2d) 296, (C. C. A. 4th) *sub nom. Gillam* v. *United States,* certiorari denied 270 U. S. 635, a British vessel which came within one hour's sailing distance of the coast was pursued by a Coast Guard cutter and seized beyond the twelve-mile limit and more than an hour's sailing distance from the coast. Forfeiture was sought on several grounds, including violation of various provisions of the Tariff Act of 1922. It was contended that the seizure was illegal because made outside of the

treaty limits. While the court upheld the forfeiture on several grounds, it disposed of the argument based on the treaty as follows (p. 174):

> * * * If the contention of counsel is correct, then the effect of the treaty in a large number of cases would be to restrict the rights of the United States; but that was not the object of the treaty. As was said by the Supreme Court in the case of *Ford* v. *U. S.*, 47 S. Ct. 531, 71 L. Ed. —, decided April 11, 1927, the parties were dealing with a situation well understood by both, and wished to enable the United States better to police its seaboard by enabling it within an hour's sail from its coast beyond its territorial jurisdiction and on the high seas to seize British actual or would-be smugglers of liquor.
>
> The court also said that the treaty indicates a considerate purpose on the part of Great Britain to discourage her merchant ships from taking part in the illicit importation of liquor into the United States, and the further purpose of securing without objection or seizure the transportation on her vessels through the waters and in the ports of the United States of sealed sea stores and sealed cargoes of liquor for delivery at other destinations beyond the United States, and that the counter consideration moving to the United States is the *enlargement* (italics mine) and the definite fixing of the zone of legitimate seizure of British hovering vessels seeking to defeat the laws against importation of liquor into this country from the sea.

> The court also said that, considering the friendly purposes of both countries in making the treaty, it should not be given a narrow construction which would defeat it. *Ford* v. *U. S.*, supra.
>
> There is not a syllable in the treaty itself which indicates any intention to restrict or abrogate any of the existing rights of the United States in reference to the subject matter. At the time the treaty was executed, and for a long time anterior thereto, the United States had exercised the right of search and seizure within the 12-mile limit. Similar rights, as we have seen, had been exercised by the British government from the early part of the eighteenth century. It is inconceivable that the parties could have intended to abrogate any such rights already existing without an explicit statement to that effect. I am clearly of opinion that the British treaty is not exclusive and did not abrogate the statute of the United States providing for search and seizure within the 12-mile limit.

In affirming the decree, the Circuit Court of Appeals said (p. 300):

> * * * And we do not think that the right within the 12-mile limit to seize and proceed against vessels bound for the United States, for violation of the provisions of its revenue laws, has been limited in any way by the provisions of the Treaty with Great Britain of 1924 (43 Stat. 1761). The purpose of that treaty, so far as the question

here is concerned, was to secure the right to search and arrest ships from which intoxicating liquors are sold just beyond the limits of territorial jurisdiction, not to interfere with the preexisting right to board and arrest ships bound for the United States which have failed to comply with the provisions of its tariff laws. From the correspondence attending the negotiation of the treaty, this clearly appears.

In *The Metmuzel,* 49 F. (2d) 368 (C. C. A. 4th), certiorari denied, 283 U. S. 866, the court sustained a decree of forfeiture of a French [9] vessel sighted within six miles of the coast of the United States and seized within twelve miles of the coast. It does not appear whether the vessel was sighted or seized within one hour's sailing distance. The court upheld the seizure in part upon authority of its decision in *Gillam* v. *United States, supra.* It does not appear whether any objection to forfeiture because of treaty provisions was made. Other cases cited in support of this view are *The Panama,* 6 F. (2d) 326 (S. D. Tex.); *The Resolution,* 30 F. (2d) 534 (E. D. La.); *The Pescawha,* 45 F. (2d) 221 (D. Ore.). See also *Ford* v. *United States,* 10 F. (2d) 339 (C. C. A. 10th), affirmed 273 U. S. 593, *supra.*

There are other cases where seizures of foreign vessels were made, or the vessels were sighted, within the twelve-mile limit, and possibly beyond treaty

[9] A treaty with France, similar to the treaty with Great Britain, was proclaimed on March 12, 1927 (45 Stat. 2403).

limits, in which forfeiture was decreed, although it does not appear that the question of seizure in violation of treaties was raised, and the opinions do not discuss the effect of the treaties. *United States* v. *63 Kegs of Malt,* 27 F. (2d) 741 (C. C. A. 2d); *The Newton Bay,* 30 F. (2d) 444 (E. D. N. Y.), affirmed 36 F. (2d) 729 (C. C. A. 2d); *The Amaranth,* 35 F. (2d) 872 (S. D. N. Y.); *The Marion Phillis,* 36 F. (2d) 688 (C. C. A. 2d); *The Deauville,* 49 F. (2d) 372 (S. D. Ala.); *The Throndyke,* 53 F. (2d) 239 (N. J.); *The Miss C. B.,* 59 F. (2d) 744 (S. D. Ala.).

In support of the view presently under discussion it is urged that its acceptance is necessary to the normal development of international law. With respect to waters within the three-mile zone, known internationally as "territorial waters," it is said that the law is static, and that there is little or no room for further development. The provisions of Article I of the Treaty, which refer to the three-mile zone, are therefore merely declaratory of settled international law. Outside that zone, however, the law is in process of evolution. Its growth results from the assertion by one or more sovereigns of rights to which other sovereigns do not assent. When that which is affirmed on the one hand and denied on the other comes within the cognizance of a competent court the decision one way or the other is either tacitly accepted or explicitly rejected by the sovereign aggrieved by the decree.

As a judicial question, however, the issue is settled by the decision as far as concerns the sovereign whose court has made the decree. If the other sovereign formally protests the decision the question becomes the subject of diplomatic consideration. Upon the outcome of such consideration depends the question whether or not the judicial decision takes a permanent place in the process of evolving international law.

In July of this year the Privy Council in England (*Croft* v. *Dunphy,* 48 The Times L. R. 653) considered the validity of a statute enacted by the Canadian Parliament which provided that if any vessel was hovering in territorial waters of Canada she might be boarded and her cargo examined, and if any dutiable goods or any goods the importation of which into Canada was prohibited were found on board, the vessel and her cargo were to be seized and forfeited. For the purposes of the section "territorial waters" of Canada were to mean the waters forming a part of Canada and waters adjacent thereto, within three marine miles thereof in the case of any vessel, and within twelve marine miles thereof in the case of any vessel registered in Canada.

The Supreme Court of Canada held that the statute in question was valid. Lord Macmillan, in delivering the judgment of the Privy Council, said that it might be accepted as a general principle that states could legislate effectively only for

their own territory; and to what distance seaward the territory of a state was to be taken as extending was a question of international law, upon which their Lordships did not deem it necessary or proper to pronounce.

In the course of his judgment, Lord Macmillan said (p. 653):

> * * * But whatever be the limits of territorial waters in the international sense, it has long been recognized that for certain purposes, notably those of police, revenue, public health and fisheries, a State may enact laws affecting the seas surrounding its coasts to a distance seaward which exceeds the ordinary limits of its territory. There is the weighty authority to this effect of Lord Stowell, who, when Sir William Scott, said in the case of *Le Louis* (2 Dodson, 210, at p. 245): "Maritime States have claimed a right of visitation and inquiry within those parts of the ocean adjoining to their shores, which the common courtesy of nations has for their common convenience allowed to be considered as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which within certain limited distances more or less moderately assigned, subject foreign vessels to such examination."

In further support of this statement Lord Macmillan cites such authorities as Sir Travers Twiss' treatise on International Law; Halleck's "International Law"; Hall's "Foreign Powers and Jurisdiction of the British Crown"; and "Without further multiplying quotations" adds references to Phillimore's "International Law" and Wheaton's "International Law", 6th Edition (See footnote 10, *infra,* p. 50). Lord Macmillan further said (p. 654):

> * * * It may be that legislation of the Dominion Parliament may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the British North America Act, 1867, has not conferred power on the Dominion Parliament to legislate contrary to these principles. In the present case, however, there is no question of international law involved, for legislation of the kind here challenged is recognized as legitimate by international law, and in any event the provision impugned has no application to foreign vessels. * * *
>
> * * * * *
>
> * * * Now from early times the customs legislation of the Imperial Parliament has contained antismuggling provisions authorizing the seizure of vessels having dutiable goods on board when found "hovering" off the coast within distances substantially

> in excess of the ordinary territorial limits. So far back as 1736 there is to be found in the statute 9 Geo. II., c. 35, s. 22, legislation authorizing the forfeiture of dutiable goods found in vessels "hovering" within two marine leagues of the shore. There are numerous subsequent enactments of a similar character, and legislation of this nature has been extended as far as to twenty-four miles from the coast. So familiar indeed are such provisions in the history of British customs legislation that the series of measures embodying them have come to be known compendiously as the "Hovering Acts." * * *

While this judgment did not involve the determination of any question of international law, because the Canadian legislation in question could have no application to foreign ships beyond the three-mile territorial limit, the judgment of the Privy Council declares that it has long been recognized that a state may enact laws operating to a distance exceeding the ordinary limits of its territory; and in support of this declaration refers to the Customs legislation of the Imperial Parliament which from early times had contained antismuggling provisions authorizing the seizure of vessels found hovering off the coast within distances substantially in excess of territorial limits.[10]

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[10] Some of the early British statutes relating to smuggling are Act 5, George I, ch. 11, p. 127 (1718); Act 9, George II, ch. 35, p. 21 (1736); Act 3, George III, ch. 22, p. 443 (1762); Act 24, George III, ch. 47, p. 660 (1784). These

Great Britain's comparatively recent change of policy does not impair the recognized right of other nations to enact such legislation. The existence of such legislation in the Tariff Act of 1922, and its reenactment in the Tariff Act of 1930, when read in connection with the judgment of the Privy Council, and the fact that in the instant case His Brittanic Majesty has raised no objection to the boarding, search, and seizure of the *Mazel Tov,* lends force to the view that the Treaty of 1924 was not intended to be, and is not now understood to be, a limitation upon the right of the United States to make search and seizure pursuant to well recog-

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Acts were repealed by Act 6, George IV, ch. 105, p. 614 (1825). Act 6, George IV, ch. 107, sec. 7, p. 697, provided for production of manifests by vessels within 4 leagues of the coast, and Act 6, George IV, ch. 108, sec. 3, p. 742, provided for forfeiture of foreign vessels carrying certain goods within 8 leagues of the coast (or within 4 leagues of a limited part of the coast). Further provision against smuggling was made by Acts 3 and 4, William IV, ch. 53, p. 362 (1833). These statutes were repealed and the entire subject was dealt with in the Customs Consolidation Act of 1876, 39 and 40 Vict., ch. 36, limiting the right of search and seizure to one league from the coast. The British statutes mentioned, and others exercising authority over the Ceylon pearl banks beyond ordinary territorial waters are discussed in Jessup; *Law of Territorial Waters and Maritime Jurisdiction*, pp. 14–17, 77–79. A large number of countries have had hovering statutes at various times which applied to foreign vessels outside of territorial waters. Many of these statutes are collected in Crocker, *The Extent of the Marginal Sea.* See also 23 C. L. R. 472–476 (1923). The subject is dealt with by several text writers and the right to exercise authority beyond territorial waters under certain circumstances is upheld. See Hyde: *International*

nized principles of international law anywhere within four leagues of her shores.

In the view of the Treaty here under discussion the whole question reduces itself to this:

Within the three-mile limit there is no longer room for dispute respecting what may or may not lawfully be done. Outside the three-mile limit, but within the Treaty limits, there is room for such dispute, but Great Britain agrees that she will not raise the question in cases involving violation of our liquor laws. Beyond the Treaty limits, and up to the limit specified in municipal legislation, there is the same room for discussion, for assertion and protest, and both parties are as free to assert their respective contentions as before the Treaty was made.

If the reasoning advanced by the court below in support of its judgment is sound, or if the Treaty with Great Britain is not to be construed as imposing any limitation upon the asserted right of the United States to search and seize vessels within the

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Law Chiefly as Interpreted and Applied by the United States, vol. 1, p. 420; Oppenheim: *International Law* (4th Ed.), vol. 1, p. 400; Hall: *Foreign Jurisdiction of the British Crown*, pp. 244–245; Westlake: *International Law* (2d Ed.), Part 1, p. 176; Twiss: *The Law of Nations: Rights and Duties in Time of Peace* (2d Ed.), Sec. 190, p. 311; Dana's *Wheaton on International Law* (8th Ed.), p. 259; Halleck: *International Law* (3rd Ed.), vol. 1, p. 157; Phillimore: *International Law*, par. 198. See also argument of Sir Charles Russell before the Bering Sea Arbitral Tribunal in 1893, *Fur Seal Arbitration*, Vol. XIII, Sec. 1076, p. 298.

twelve-mile limit, and is merely an agreement on the part of Great Britain to raise no objection to any such search and seizure if the vessel be within one hour's sailing distance of the coast, then the judgment of the court below should be affirmed. If, however, the Treaty is to be construed as limiting the right of search and seizure, in all cases, to vessels within such sailing distance, then the judgment of the court below should be reversed unless the question was immaterial or was waived, as we have argued in Point I, in which case the judgment should also be affirmed.

CONCLUSION

For the reasons stated in Point I the judgment of the court below should be affirmed.

If the reasoning of Point I be rejected, we present the conflicting views regarding the application and interpretation of the Treaty, set forth in Point II, for the consideration of the Court in determining the validity of the seizure.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

WHITNEY NORTH SEYMOUR,

A. W. HENDERSON,
Special Assistants to the Attorney General.

W. MARVIN SMITH,
Attorney.

DECEMBER, 1931.

APPENDIX A

The pertinent provisions of the Tariff Act of 1922, c. 356, 42 Stat. 858, 979, 980, 982, and the identical provisions of the Tariff Act of 1930, c. 497, 46 Stat. 590, 747, 748, 751 (U. S. C. Sup., Title 19, Secs. 1581, 1584, 1594), are as follows:

SEC. 581. BOARDING VESSELS

Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation.

Officers of the Department of Commerce and other persons authorized by such depart-

ment may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

* * * * *

SEC. 584. FALSITY OR LACK OF MANIFEST—PENALTIES

Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after having been unladen from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge or the owner of such vessel or vehicle shall be subject to a penalty of $500: *Provided*, That if the collector shall be satisfied that the manifest was lost or mislaid without intentional fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake and that

no part of the merchandise not found on board was unshipped or discharged except as specified in the report of the master, said penalties shall not be incurred.

If any of such merchandise so found consists of smoking opium or opium prepared for smoking, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty of $25 for each ounce thereof so found. Such penalty shall, notwithstanding the proviso in section 594 of this Act (relating to the immunity of vessels or vehicles used as common carriers), constitute a lien upon such vessel which may be enforced by a libel in rem; except that the master or owner of a vessel used by any person as a common carrier in the transaction of business as such common carrier shall not be liable to such penalty and the vessel shall not be held subject to the lien, if it appears to the satisfaction of the court that neither the master nor any of the officers (including licensed and unlicensed officers and petty officers) nor the owner of the vessel knew, and could not, by the exercise of the highest degree of care and diligence, have known, that such smoking opium or opium prepared for smoking was on board. Clearance of any such vessel may be withheld until such penalty is paid or until a bond, satisfactory to the collector, is given for the payment thereof. The provisions of this paragraph shall not prevent the forfeiture of any such vessel or vehicle under any other provision of law.

SEC. 585. DEPARTURE BEFORE REPORT OR ENTRY

If any vessel or vehicle from a foreign port or place arrives within the limits of any collection district and departs or at-

tempts to depart, except from stress of weather or other necessity, without making a report or entry under the provisions of this Act, or if any merchandise is unladen therefrom before such report or entry, the master of such vessel shall be liable to a penalty of $5,000, and the person in charge of such vehicle shall be liable to a penalty of $500, and any such vessel or vehicle shall be subject to forfeiture, and any customs or Coast Guard officer may cause such vessel or vehicle to be arrested and brought back to the most convenient port of the United States.

SEC. 594. LIBEL OF VESSELS AND VEHICLES

Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same: *Provided,* That no vessel or vehicle used by any person as a common carrier in the transaction of business as such common carrier shall be so held or subject to seizure or forfeiture under the customs laws, unless it shall appear that the owner or master of such vessel or the conductor, driver, or other person in charge of such vehicle was at the time of the alleged illegal act a consenting party or privy thereto.

APPENDIX B

Pertinent provisions of the Treaty with Great Britain proclaimed May 22, 1924 (43 Stat. 1761):

Article I

The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.

Article II

(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is commit-

ting or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

Article III

No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions on board British vessels voyaging to or from ports of the United States, or its territories or possessions or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall

be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

Article IV

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by Article II of this Treaty or on the ground that it has not been given the benefit of Article III shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.

Article V

This Treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its

desire to propose modifications in the terms of the Treaty.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the Treaty shall lapse.

If no notice is given on either side of the desire to propose modifications, the Treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the Treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the Treaty shall lapse.

Article VI

In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present Treaty the said Treaty shall automatically lapse, and, on such lapse or whenever this Treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this Treaty not been concluded.

The present Convention shall be duly ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Brittanic Majesty; and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof, etc.

(The treaty is signed on behalf of the United States by Charles Evans Hughes and on behalf of Great Britain by A. C. Geddes.)

148630—32——5

APPENDIX C

THE SECRETARY OF STATE TO THE BRITISH AMBASSADOR

DEPARTMENT OF STATE,
Washington, June 26, 1922.

EXCELLENCY: I have the honor to lay before you certain important considerations with respect to a possible cooperation on the part of British and American authorities with regard to the smuggling of liquor. The authorities of the United States charged with the duty of enforcing the law of this country with respect to this matter are confronted by serious difficulties which they feel might be effectively met with the assistance of British authorities in British territories, which it appears are made bases of operations in flagrant violation of constitutional and statutory provisions of the United States. It is understood that the importation of intoxicating liquors into the Canadian Provinces of Nova Scotia, Manitoba, Saskatchewan, and Alberta, is also prohibited by law.

I venture to submit definite suggestions as to methods by which the existing extremely unfortunate conditions might be remedied. It is believed that effective measures for this purpose might be taken by a careful supervision of the issuance of registries to vessels suspected of being engaged in illegal traffic and of the issuance of clearance papers for such vessels, and by an international ar-

rangement between the United States and Great Britain under which the authorities of each nation would be authorized to exercise beyond the three-mile limit of territorial waters a measure of control over vessels belonging to the other.

It has been found that many of the ships engaged in the illegal smuggling of liquor into the United States are registered under the British flag and that large quantities of liquor are carried by such vessels from the Bahama Islands and from Bermuda. It appears that, in order to evade the customs officers and prohibition agents of the United States, the persons engaged in this illicit traffic of smuggling liquor into the United States from the Bahama Islands have adopted the practice of packing the liquor so that it can be easily taken ashore in the United States. Liquor is placed in triangular-shaped packages consisting of six bottles carefully sewed in burlap, so that it can very easily be unloaded, and even a small ship can carry a very large consignment in a comparatively small hold space. Liquor is carried on both large and small ships; schooners carry cargoes out to sea from Nassau and unload them off the coast of the United States, and smaller boats carry their cargoes to Bimini and Gun Key, and from these places it is transported to West Palm Beach, Daytona, and Fort Lauderdale. A list of vessels said to be plying between the United States and the Bahamas is herewith enclosed.

This Department's attention has been drawn to the ease with which it seems vessels of American registry are transferred to British registry for the purpose of preventing the authorities of the United

States from taking the necessary steps to thwart these smuggling operations. It is understood that British laws require that vessels to be entitled to British registry must be owned by British subjects. Apparently reliable information indicates that American citizens of questionable reputation who are known to be engaged in the smuggling business have succeeded in obtaining British registry at the Bahama Islands for a large number of American vessels by means of the execution of paper transfers purporting to convey title to vessels to British subjects in the Bahamas, although the actual interest in the vessels continues to vest in American citizens.

Reference may be made in this connection to the fact that, under the laws of the United States relating to the transfer of registry, it is necessary for the owner of an American vessel to obtain a certificate from the United States Shipping Board showing that the vessel has first been tendered to the Board before the privilege of transferring it to a foreign register can be obtained. It would be of great assistance to this Government in combating the illicit traffic in liquors if authorities at Bermuda and in the Bahama Islands should refuse the privilege of registry to American vessels unless a certificate from the United States Shipping Board is produced showing that the vessel has first been tendered to it. It is understood that for some time British laws have imposed restrictions necessitating some form of acquiescence of British authorities to the transfer of registry. It would seem that laws of this character can not well be effectively administered unless the authorities of one

nation are disposed to take cognizance of the legislation of another nation.

There is information before the Department indicating that the authorities at the Bahama Islands have in many cases issued two sets of clearance papers to ships which have taken on board cargoes of liquor. It is said that persons engaged in this traffic have openly made the statement that they have no trouble in obtaining from the Bahamas's customs officials one set of clearance papers for a cargo of liquor declared to be destined for Halifax, Tampico or St. Pierre, and other clearance papers issued "in ballast" for an American port. This procedure is adopted by the liquor smugglers so that the ship may come within unloading distance of American shores, and if caught with a cargo of liquor on board the master can exhibit the clearance to Mexico or Canada; if the ship has succeeded in unloading the cargo on the shore without being captured, it proceeds into an American port with the second clearance papers.

In this connection I beg to quote for your information three paragraphs from an affidavit executed by a federal prohibition agent of this Government with respect to the proposal declared to have been made to him by Mr. M. Cole, who signs clearance papers for the Comptroller of Customs for the British Government at Nassau, Bahamas, concerning the issuance of two sets of clearance papers for liquor ships:

> That deponent asked Mr. Cole how the liquor runners arranged their clearance papers and if it was possible to get an extra set of clearance papers. Mr. Cole said "Just a minute" and then went to the other side of

the room and motioned deponent to come over which deponent did, Mr. Cole then stated substantially as follows:

That "there are a number of ways to handle it but the best and simplest way we find is, First to give you clearance papers with your liquor, then in an hour or so come back and state that you had discharged your cargo of liquor on the high seas and then we will give you another set of papers for 'in ballast' for any American port." Mr. Cole explained that the first set of papers referred to would be for a Foreign Port and that if you were searched they could not touch you and that after you had discharged your cargo of liquor you could enter the American Port with your papers showing "in ballast."

Deponent states further that Mr. Cole did not say that there would be any money required outside the regular fees but intimated that he and the boys expected to be taken care of.

While existing nefarious practices might be largely stopped by appropriate precautionary measures with respect to the issuance of British registries to vessels engaged in smuggling and with respect to the issuance of clearance papers to such vessels, the situation with which the authorities of this Government are confronted has become so serious that this Government feels prompted to inquire whether your Government would be disposed to enter into a treaty for the purpose of checking the illegal practices in question. Such a treaty might contain reciprocal provisions authorizing the authorities of each Government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters *to the extent of*

twelve miles from the shore. It would appear that no inconvenience would be experienced as a result of the exercise of such a right by vessels engaged in legitimate trade between Nassau and Halifax. It is evidently natural for such vessels to take a direct route to Hatteras and then a direct course to Diamond Shoal Lighthouse and from thence to Halifax. Apparently this course brings vessels at no point within four leagues of the American shore. I shall be glad if you will bring the contents of this communication to the attention of your Government, which I have no doubt will appreciate the serious considerations which prompt the request that the matters therein presented receive earnest consideration at the earliest convenient time.

Accept (etc.).

CHARLES E. HUGHES.

APPENDIX D

THE BRITISH AMBASSADOR TO THE SECRETARY OF STATE

No. 781

BRITISH EMBASSY,
October 13, 1922.

SIR: Mr. Chilton duly forwarded to His Majesty's Government copy of your note of June 26th last in which certain suggestions were made for cooperation between the British and United States authorities with the object of restricting the smuggling of alcoholic liquor into the United States.

I am now directed to inform you that His Majesty's Government have naturally been desirous of preventing, by every means within their power, any breaches of the law in the Bahamas or elsewhere in the British West Indies by persons engaged in illicit trade with the United States, and the proposals made by the United States Government with this object have received the most sympathetic consideration. With the object of preventing the development of illegal practices in connection with this traffic instructions had, in fact, some months before the receipt of the representations made by the United States Government, been sent to the Governor of the Bahamas, who was at that time requested to see that no irregularities of any kind should be permitted in connection with vessels clearing from that colony and that the formalities required in connection with such clearances should be most

strictly enforced. Instructions have also been given to the local Registrars of Shipping which will, it is anticipated, have the effect of preventing any future transfers of United States vessels to the British flag until a complete investigation of the circumstances can be made. Investigations, which it is hoped will shortly be concluded, are being made into the position and proceedings of the vessels, a list of which was enclosed in your note of June 26th.

In dealing with the precautions to be taken to control transfers from the United States to the British flag, the suggestion that, in such cases, the local Registrar of Shipping should require the production of a certificate from the United States Shipping Board has been carefully examined. It has been found that there would be great difficulties in the adoption on British territory of such a requirement, and it would be still more difficult to give such a requirement the force of law. With a view, however, to meeting the wishes of the United States Government on this point as far as is practicable, instructions have been given to the Registrar of Shipping at Nassau to the effect that, in transfer cases in which any possible doubt exists as to the *bona fides* of the parties to the transaction, the nonproduction of the Shipping Board certificate should be taken as a ground of suspicion, involving reference of the case to the Board of Trade in London for further directions. The delay necessitated by this procedure would, it is hoped, be in itself sufficient to reduce to a minimum the danger of transfers being successfully effected in improper cases. It may be added that if, in spite of

the precautions taken, a fictitious owner secures registry and there is reason to believe that his title is open to question, an enquiry may be instituted under Section 51 of the Merchant Shipping Act, 1906, and if, as a result of these proceedings, it becomes clear that the transaction was fraudulent, the ship is subject to forfeiture. Proceedings under this section of the act had in fact already been instituted in some cases, and the possibility of instituting similar proceedings in the case of some of the vessels referred to in the note from the State Department is being examined.

His Majesty's Government had thus taken steps even before the receipt of representations from the United States Government to prevent the practices to which attention has now been drawn. They have now, as already indicated, issued supplementary instructions in the matter, and hope that the measures taken will prove successful in preventing any breaches of the local law. They feel, however, more difficulty in accepting the proposal that a treaty should be made authorising the authorities of each government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters up to a distance of twelve miles from the shore. His Majesty's Government have consistently opposed any extension of the limit of territorial waters such as that now suggested. They feel that the outbreak of smuggling which has led to the proposal can not be regarded as a permanent condition, but as one which will no doubt be suppressed by the United States authorities within the not distant future. While, therefore, they are desirous of assisting the United States Govern-

ment to the best of their ability in the suppression of the traffic and in the prevention of the abuse of the British flag by those engaged in it, they do not feel that they can properly acquiesce, in order to meet a temporary emergency, in the abandonment of a principle to which they attach great importance.

In communicating the above to you I am directed to add that while His Majesty's Government are, as already indicated, unable to acquiesce in the proposed treaty for the extension of territorial waters, they are nevertheless most desirous of taking any steps within their power to prevent any infractions of the local law by persons engaged in liquor smuggling.

I have (etc.).

A. C. GEDDES.

APPENDIX E

THE BRITISH AMBASSADOR TO THE SECRETARY OF STATE

BRITISH EMBASSY,
Washington, December 30, 1922.

No. 973.

SIR: On September 27th last a statement, purporting to be officially inspired, appeared in the daily press to the general effect that the United States Government had decided to restrain prohibition enforcement officials from seizing, outside the three-mile limit of territorial waters, foreign vessels which are suspected of being engaged in the smuggling of liquor. According to the same statement, however, this ruling did not apply to the searching, beyond the three-mile limit, of ships which were known to be in contact with the shore, such as the running of small craft of the ship to some point on the land.

From semiofficial correspondence which has since passed between us in regard to individual British vessels arrested outside territorial waters on the charge of liquor smuggling it appears that the United States Government are in fact acting on the principle defined above. The majority of such vessels either have, through your kind intervention, already been released or else are in process of being restored to their owners. The only exceptions to this rule appear to have been made in the

case of vessels, notably the *Grace and Ruby,* in respect of which a charge has been lodged of having been in communication with the shore by means of the ship's small boats.

In order to avoid the possibility of any misunderstanding, I am desired by my Government to make it clear that His Majesty's Government are unable to acquiesce in what they understand to be the ruling of the United States Government, namely, that foreign vessels may be seized outside the three-mile limit if it can be shown that they have established contact with the shore for illegal purposes by means of their own small boats. My Government must reserve their right to lodge a protest in any individual case in which action may be taken by the United States Government under this ruling.

I have (etc.).

A. GEDDES.

APPENDIX F

The Secretary of State to the British Ambassador

Department of State,
Washington, January 18, 1923.

Excellency: I have the honor to acknowledge the receipt of your note No. 973 of December 30, 1922, stating that your Government desires you to make it clear that it is unable to acquiesce in what it understands to be the ruling of the United States Government, namely, that foreign vessels may be seized outside the three-mile limit if it can be shown that they have established contact with the shore for illegal purposes by means of their own small boats. You state that your Government must reserve the right to lodge a protest in any individual case in which action may be taken by the United States Government in cases of this character.

I have the honor to state that consideration has been given to the statements contained in your note and the conclusion has been reached that the Government of the United States should adhere to the position it has previously taken that foreign vessels outside the three-mile limit may be seized when it is established that they are using their small boats in illegal operations within the three-mile limit of the United States. This conclusion is supported by the position taken by the British Government

in the case of the British Columbian schooner *Araunah,* which was seized off Copper Island, by the Russian authorities in 1888, because it appeared that members of the crew of the schooner were illegally taking seals in Bering Sea by means of canoes operated between the schooner and the land, and it was affirmed that two of the canoes were within half a mile of the shore. Lord Salisbury stated that Her Majesty's Government were "of opinion that, even if the *Araunah* at the time of the seizure was herself outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters without the prescribed license warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters." (Volume 82, British and Foreign State Papers, page 1058.)

I may add that it is not understood on what grounds the decision of His Majesty's Government in this matter was reached, in view of the position taken by Lord Salisbury in the *Araunah* case and the statement in your note No. 781 of October 13, 1922, that his Majesty's Government "are desirous of assisting the United States Government to the best of their ability in the suppression of the traffic and in the prevention of the abuse of the British flag by those engaged in it."

As you are doubtless aware, the case of the *Grace and Ruby,* to which you refer, is now pending before the Supreme Court of the United States and I shall be glad to inform you of its decision as soon as it is rendered.

Accept (etc.).

CHARLES E. HUGHES.

APPENDIX G

The British Chargé d'Affaires ad Interim to the Secretary of State

British Embassy,
Washington, July 10, 1923.

No. 578.

Sir: I have the honour to inform you that my attention has been drawn to certain comments in the press regarding the recent decision of the United State Circuit Court of Appeal in connection with the condemnation and forfeiture of the alleged British schooner *Henry L. Marshall* for smuggling liquor into the United States in contravention of the prohibition laws. You will recollect that this vessel was seized by United States Revenue officials in July 1921 when off the coast of New Jersey and outside the limit of United States territorial waters.

The general trend of these comments is to the effect that the view of many American legal experts that the United States Government has the right to seize rum runners outside the three-mile limit is shared by the State Department, and it is hinted that the absence of a protest by His Majesty's Government against the condemnation of the *Henry L. Marshall* by the United States Circuit Court of Appeal not only makes the case a useful precedent for similar future action by the United States au-

thorities outside the three-mile limit against British vessels suspected of rum running, but also implies a change in the attitude of His Majesty's Government towards the principle of such seizures outside the three-mile limit.

In order to avoid the possibility of any misunderstanding on the part of the United States Government as to His Majesty's Government's attitude in this matter I have the honour, under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, to inform you that any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by His Majesty's Government as creating a very serious situation. In regard to the *Henry L. Marshall case,* I have been instructed to explain that the absence of a protest by His Majesty's Government against the condemnation of this vessel in no way implies any alteration in the views of His Majesty's Government with regard to the principle at stake, inasmuch as that vessel, owing to the circumstances in which she secured her British registry, was not recognized by His Majesty's Government as entitled to British registry. Consequently, His Majesty's Government have not felt called upon to assert the principle at stake on her behalf, since, as far as His Majesty's Government are concerned, the *Henry L. Marshall* remains an American vessel.

I have (etc.).

H. G. CHILTON.

148630—32——6

APPENDIX H

DRAFT OF PROPOSED TREATY SUBMITTED TO GREAT BRITAIN, FRANCE, ITALY, JAPAN, AND SPAIN, JUNE 19, 1923.

ARTICLE I. The High Contracting Parties, without attempting to extend as between themselves the limits of their respective territorial waters adjacent to the high seas, agree that the authorities of either High Contracting Party may, within the distance of twelve geographical miles from its coasts, board the private vessels of the other and make inquiry of the masters thereof as to whether such vessels or the person or persons controlling them are engaged in any attempt, either with or without the cooperation of other vessels, or persons on board the same, to violate the laws of the High Contracting Party making the inquiry, and prohibiting or regulating the unlading near, or importation into its territories of any articles.

An officer of one High Contracting Party boarding a private vessel of the other may examine the manifest of the vessel and make inquiry of the master with respect to the cargo and destination thereof. If such officer has reason to believe from the statements of the master or from documents exhibited by him or otherwise, that the vessel or the person or persons controlling it, either with or without the cooperation of other vessels, or persons on board the same, is or are engaged in the willful

commission of acts which constitute a violation of the laws of the State of which such boarding officer is an official, with respect to the unlading or importation of any article or articles, he shall impart his belief to the master of the vessel and thereupon may with the aid of the master institute a search of the vessel and an examination of any articles on board.

The search shall be conducted with the courtesy and consideration which ought to be observed between friendly nations. If there is reasonable cause for belief that the vessel or the person or persons controlling it is or are willfully engaged, with or without the cooperation of other vessels or persons on board the same, in the commission of acts which constitute a violation of the laws of the State whose officer has conducted the search, forbidding or regulating the unlading near, or importation into its territories of any article or articles, the vessel, cargo and the person or persons controlling it or them may be seized and brought in for an adjudication, and subjected to the imposition of the penalties established by law by the Party whose laws and regulations are found to have been violated.

ARTICLE II. Any article or articles the importation of which into the territories of either High Contracting Party is or are for any purposes prohibited by its laws, but which is or are listed as sea stores, or as cargo destined for a port foreign to either High Contracting Party, on board a private vessel of either High Contracting Party destined for a port of the other High Contracting Party, may be brought within the territorial waters of

certainty the position of a limit usually out of sight of land, at any rate on the Atlantic coast.

Lord Curzon adds that the Hovering Acts in the United Kingdom were entirely superseded by the Customs Consolidation Act, 1876, by which British municipal legislation is made to conform with international law.

July 14, 1923.

APPENDIX J

THE SECRETARY OF STATE TO THE BRITISH CHARGÉ D'AFFAIRES AD INTERIM

BRITISH EMBASSY,
Washington, July 16, 1923.

SIR: I have the honor to acknowledge the receipt of your communication No. 578 of July 10, last, in relation to the recent decision of the United States Circuit Court of Appeals in the case of the schooner *Henry L. Marshall,* and to certain American press comments thereon. You advert to the general trend of these comments and to the inferences which are drawn from the views of many American legal experts.

I note your statement that under instructions from your Government you inform me that any attempt on the part of the United States authorities to seize a British ship outside the three-mile limit would be regarded by your Government as creating a very serious situation. With respect to the case of the *Henry L. Marshall,* you state that you have been instructed to explain that the absence of a protest by His Majesty's Government against the condemnation of the vessel in no way implies any alteration in the views of your Government with respect to the principle at stake inasmuch as the vessel was not recognized as entitled by your Government to British registry; and you add, that so far as your Government is concerned, the *Henry L. Mar-*

shall remains an American vessel. The Department is pleased to receive this formal statement as to the status of the vessel as it is recalled that your Embassy had made protests against the seizure of the vessel in your communications No. 623, of August 11, 1921, and No. 686, of September 9, 1921, and that the Department had also been in receipt of communications from your Embassy in respect to the progress of the cause and the detention of certain members of the crew as witnesses.

In view of the emphasis placed in your last communication upon the principle deemed to be involved, it would seem appropriate to direct your attention to the precise import of the adjudications in the United States District Court for the Southern District of New York and, on appeal, in the United States Circuit Court of Appeals for the Second Circuit, from whose decrees it is not understood that the claimant has as yet sought by writ of certiorari to obtain a review in the Supreme Court of the United States. For this purpose I may refer to the pertinent facts as these have been judicially established and set forth in the statement of the case by the United States Circuit Court of Appeals. The vessel sailing under British registry in 1921 obtained clearance from West End, Bahama Islands, when actually laden with a cargo of intoxicating liquors. She received two clearances of the same date and signed by the same Collector of Revenue, one of which stated that she had cleared for Halifax with the cargo of liquor, the other that she had cleared for Gloucester, Massachusetts, in ballast. The same Collector furnished two bills of health, likewise differing as to destination. It was abundantly proved that the real object and only

business of the *Henry L. Marshall* was to peddle liquor along the coast of the United States. "Particularly", states the official report of the decision, "did she pursue her vocation while lying some nine or ten miles off Atlantic City and there sent liquor on shore, pursuant to previous arrangement made in the United States, by motor boats", which, however, were not a part of the schooner's equipment, and, so far as appears, did not belong to her owner. When the *Marshall* was boarded more than three miles from the New Jersey coast it was found that she had no manifest and still had on board a quantity of liquor.

The United States Circuit Court of Appeals in affirming the decrees which were passed upon the libels for forfeiture, held that the act of unlading although beginning beyond the three-mile limit continued until the liquor was landed; that the *Marshall's* cargo of whiskey was never manifested; that it was not unladen between the rising and setting of the sun and that no special license had been obtained for unloading at night; and that there was an unloading without a permit—all in violation of provisions of the Revised Statutes of the United States. The United States Circuit Court of Appeals concluded: (*a*) that there was an attempt to introduce all of the *Marshall's* cargo into the commerce of the United States, and that there was an actual introduction of a part of that cargo into that commerce; (*b*) that such attempt at introduction was by means of fraudulent practices, i. e., evasion of the provisions of the National Prohibition Act; (*c*) that there were wilful acts (i. e., rum running) by means whereof the United States was

deprived of duties upon the merchandise (i. e., whiskey) affected by the said act.

The foregoing conclusions are deemed by this Government to be self explanatory. They relate to the conduct of a vessel which was far from exercising the normal right of passage on the high seas adjacent to American waters in the course of a voyage between two British ports. They show that the vessel and those controlling it started upon its sinister voyage with connivance and aid of British authority in British territory; that its direct and single effort was by fraudulent means to introduce the cargo, and all of it, within the territory of the United States; and that the vessel prior to and at the time of its actual seizure, even though more than three miles from the shore, was hovering off the coasts of the United States and was engaged in an attempt to violate the laws of the United States by the introduction of the liquor within its territory. It should be added that adequate judicial procedure, as already noted, was available and used, in order to determine these facts, and in these circumstances the competent judicial authority of the United States has sustained the seizure of the vessel.

In view of this decision, and of the tenor of your communication, my Government hopes that it may be advised that His Majesty's Government does not consider, even in the case of a vessel admittedly of valid British registry, that such a vessel pursuing the course of conduct followed by the schooner *Henry L. Marshall* is making proper use of the British flag and that His Majesty's Government would not be disposed to espouse the cause of a

British merchant vessel in an effort unlawfully to introduce intoxicating liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall,* or in such a case to oppose the enforcement of the laws of the United States by means of the procedure taken in the case of that vessel and judicially approved.

Accept (etc.).

CHARLES E. HUGHES.

APENDIX K

THE SECRETARY OF STATE TO THE BRITISH CHARGÉ D'AFFAIRES AD INTERIM

DEPARTMENT OF STATE,
Washington, July 19, 1923.

The Secretary of State presents his compliments to the Chargé d'Affaires ad interim of Great Britain and acknowledges the receipt of the memorandum, under date of the fourteenth instant, expressing the views of His Majesty's Principal Secretary of State for Foreign Affairs, with respect to the proposed treaty relating to visit and search of vessels within twelve miles of the coasts of the parties, respectively, for the purpose of preventing the illegal introduction of articles into their territories, and also relating to the carriage, within territorial waters, of certain sealed stores and cargo destined for foreign ports.

Preliminarily, it should be observed that a draft treaty was submitted informally, simply for the purpose of avoiding misunderstanding and of making a concrete suggestion which could form the basis of discussion. It should also be said that it was not the purpose of the Secretary of State to propose an extension of the limits of territorial waters, and the draft proposal specifically negatived such an intention.

It is noted that Lord Curzon points out that the theory of the international validity of the three-

mile limit would be strengthened by the conclusion of a treaty making an exception for a special purpose, but that he is of the opinion that such a treaty would weaken the principle because it would form a precedent, the following of which would ultimately deprive the principle of force. It is not perceived that this would be the result as no Power would be under obligation to make any other agreements unless it saw fit to do so, or to treat the special agreement as a precedent except in a case precisely analagous, and there could be inserted in the special agreement any statement or qualification that might be deemed to be advisable to show that it was definitely limited to the particular situation in view.

In relation to Lord Curzon's further suggestion, it may be stated that while the proposed treaty could not be ratified until the Senate convenes, and while the Secretary of State is not in a position to give an assurance either with respect to the action of the Senate, or with regard to the prospect of securing from Congress an amendment to the Volstead Act in relation to ship liquor and cargo liquor destined for foreign ports, it is believed that the solution of the present difficulty through the making of a fair and reasonable agreement, such as is proposed, would be the most promising method of securing early action. Therefore, Mr. Hughes trusts that the suggestion will not be put aside upon the supposition that another course is equally feasible.

With respect to Lord Curzon's suggestion that even if the twelve-mile limit were accepted, cases would inevitably occur liable to cause serious fric-

tion between the two countries owing to the difficulty of deciding with any certainty the position of a vessel usually out of sight of land, at any rate on the Atlantic coast, it is believed by this Government that the proposed special agreement would do much to reduce, if indeed it would not wholly eliminate, the causes of friction due to the present efforts to evade the laws of the United States. In this connection, it must be emphasized that the proposed agreement would not interfere with British vessels engaged in legitimate commerce and bound for American ports. Such vessels will necessarily come not only within twelve miles but within three miles of the American coast and will hence in any event be subject to examination by American authorities and will, of course, comply with the applicable laws of the United States. The proposed special agreement would bear only upon those vessels which come within twelve miles but hover off the three-mile limit for the purpose of aiding in the smuggling of intoxicating liquor, or other prohibited articles, into the territory of the United States.

It is impossible for this Government not to take all proper and lawful measures to prevent this illicit traffic from being carried on. An illustration is afforded by the case of the schooner *Henry L. Marshall,* the conduct of which recently came under the scrutiny of the United States Circuit Court of Appeals for the Second Circuit, as stated in the memorandum of the Secretary of State delivered to the British Embassy on the sixteenth instant. While it is understood that this vessel is not regarded as a British vessel, for the reason which His

Majesty's Government has stated, reference may be made to the practice of the vessel as showing the conditions with which the American Government is required to deal. The vessel did not come within the three-mile limit, but she made her arrangements for the carriage of her illicit cargo to the shore of the United States in violation of its laws, and, as the court found, while the unloading was begun outside the three-mile limit, it was continued within the territorial waters of the United States, and the vessel was engaged contrary to the laws of the United States in introducing her cargo of intoxicating liquors within the commerce of the United States.

This Government has already expressed the hope that the British Government will interpose no obstacles in such cases to the enforcement of the laws of the United States, but it is believed that an appropriate agreement which would not injure bona fide trade but would facilitate the enforcement of the laws of the United States in preventing the smuggling of liquor would remove occasions for misunderstanding and eliminate the serious friction to which the Memorandum under consideration refers.

It may confidently be asserted that there would be no disposition on the part of the American authorities, and the special agreement would not justify any attempt, to seize a British vessel, save within the limits proposed, and when it was clear that the vessel concerned was directly involved in an attempt to introduce its illicit cargo into the territory of the United States. British vessels bound for the ports of the United States would en-

counter no additional obstacles to their trade, and vessels destined for foreign ports, which happened to pass on legitimate errands within twelve miles of the American coast, would suffer no inconvenience, while such vessels as were engaged in the unlawful conduct above described would not be able to create difficulties between the two countries, much less serious friction, by attempts to secure immunity for their operations by invoking the protection of the British flag.

Although the Government of the United States regards the proposed agreement as an appropriate setting forth of the proposal, it would cordially welcome the cooperation of the British Government in moulding the form of an arrangement which would reasonably serve a purpose which, it is firmly believed, may be found to be common to both countries.

APPENDIX L

THE BRITISH CHARGÉ D'AFFAIRES AD INTERIM TO THE ACTING SECRETARY OF STATE

BRITISH EMBASSY,

No. 797. *Washington, September 17, 1923.*

SIR: With reference to the note verbale which the Secretary of State addressed to me on July 19th last, I have the honour to inform you, by instruction of His Majesty's Principal Secretary of State for Foreign Affairs, that Lord Curzon has had under careful consideration, in consultation with the other departments of His Majesty's Government concerned, Mr. Hughes's proposals for an extension of territorial jurisdiction in connection with the liquor traffic from the ordinary three-mile limit of territorial waters to a distance of twelve miles from the coast, as embodied in the draft treaty handed to me by the Secretary of State on June 11th last.

The object of the United States Government in making these proposals is to secure the right to search and arrest ships from which spirituous liquors are sold just outside the present limit of territorial jurisdiction. The extent of this traffic seems, however, to His Majesty's Government to have been exaggerated, judging from the following statement published by Mr. Haynes, the United States Prohibition Commissioner in the "New York Times" of July 18th last.

> The moonshine-still is the bootlegger's chief source of supply. From what other

> place can he get his liquor in quantity? Surely not from the rigidly controlled bonded warehouses—they are eliminated at once. As to smuggled liquor, some it is true is brought into the country, but not one-tenth as much as the illegal traffic would have us believe.
>
> When reports of huge smuggling operations are circulated it should be remembered that the illicit liquor interests are conducting a great and elaborate propaganda campaign to discredit law enforcement and that the spreading of such reports is part and parcel of that campaign. No bootlegger, of course, is willing to admit that he can obtain only adulterated moonshine. Hence, fanciful tales of the wet wave sweeping in on our coasts and other related falsehoods pass from mouth to mouth to hide the real and dangerous origin of what the bootlegger has to sell.

In face of this authoritative pronouncement Lord Curzon feels additional hesitation in accepting proposals which, with all due respect to Mr. Hughes, can not, in Lord Curzon's opinion, fail to weaken the authority of the general rule of international law, whereby three miles is regarded as the limit of territorial jurisdiction. Moreover, the Atlantic coast line of the United States, except the small part between Portland (Maine) and the Bay of Fundy, is so low that it is not as a rule visible twelve miles out at sea; the difficulty of deciding the exact position of the proposed new limit would in consequence be much increased, and there would be a constant risk of disputes arising between the two countries whenever a British ship was boarded or arrested by the United States preventive service, on

or near the new line. In this connection Lord Curzon would observe that the ancient British Hovering Acts were modified in 1876 to bring them into harmony with the principles of international law, and His Majesty's Government can not admit that the municipal legislation of any country can override those principles.

No spirituous liquors are cleared direct from the United Kingdom to United States ports and so far as British subjects are concerned, there is no violation of any law, British or international, in the sale of such liquors on the high seas to purchasers of any nationality; therefore there is no obligation upon His Majesty's Government to interfere with the prosecution of a perfectly legitimate trade. Nevertheless the whole question has been carefully examined with an earnest desire to afford the United States Government any proper assistance in the difficulties which they are encountering in the enforcement of the Volstead Act. In this spirit legislation was considered with a view to prohibiting the export of spirituous liquors to destinations adjacent to the United States except under licence or to rendering illegal the discharge of such liquors at ports other than those to which they were originally consigned. It became apparent, however, that such legislation would necessitate and could indeed only be made effective by rationing supplies not merely to countries adjacent to the United States, but to all countries, for which purpose powers would be required similar to those exercised for the control of trade during the war. The United States Government will probably agree that His Majesty's Government could hardly

be expected to revive such powers, seeing that the United States Government themselves (in March, 1920) explained their inability to ratify the convention for the control of the arms traffic on the very ground that they were not prepared to revive the war regulations by which alone a private trade could be regulated.

Assuming, however, that measures could be devised for stopping the export from the United Kingdom of spirituous liquors which might ultimately reach the United States and that all other countries were prepared to take similar action so that the traffic would not merely be diverted into other channels, His Majesty's Government would still feel great hesitation in proposing such measures to Parliament so long as British ships are prevented from carrying liquor under seal in transit through United States waters. As far as His Majesty's Government are aware, it has never been alleged that any liquor at all has made its way into the United States from the stores of British ships calling at United States ports, so that this restriction, besides constituting in effect an interference with the liberty of British ships on the high seas, appears to be entirely superfluous.

His Majesty's Government do not deny the strictly legal right of the United States or any other country to impose it jurisdiction on all ships whether national or foreign within its territorial waters. His Majesty's Government themselves claim that right and it is even the case that some of the provisions of the British Merchant Shipping Acts are such that ships visiting ports in the United Kingdom must comply with them before entering

and after leaving the jurisdiction. These provisions, however, relate solely to the safety and welfare of the ship, crew, and passengers. Similar provisions exist in the legislation of the United States and other countries and they are generally recognised as reasonable.

It is, however, equally well recognized that the circumstances of ships, travelling as they do from port to port in many different countries, are peculiar, and that to subject them to all the different and often conflicting requirements of the various jurisdictions which they may enter, would create an impossible situation. Consequently, as a matter of international comity and practice, the maritime Powers refrain from imposing their jurisdiction on foreign ships except for the purposes stated above, namely the safety and welfare of the ships, crews, and passengers. The principle was well stated in the despatch of 28th October, 1852, from Mr. Conrad, when Acting Secretary of State, to the United States minister at Madrid, wherein he writes:

> You will state that this government does not question the right of every nation to prescribe the conditions on which the vessels of other nations may be admitted into her ports. That nevertheless those conditions ought not to conflict with the received usages which regulate the commercial intercourse between civilized nations. That those usages are well known and long established and no nation can disregard them without giving just cause of complaint to all other nations whose interests would be affected by their violation.

The United States Government have indeed given recent proof of their fidelity to the same principle,

in exempting ships trading between the United States and Italy from the strict application of the Volstead Act, on the ground that Italian law requires the provision of a certain amount of liquor on such ships.

In informing you of the above I am directed to express the earnest hope that means may be found to modify the present application of the Volstead Act to British ships, and thus to remedy what is, in effect, an unwarrantable interference with the domestic concerns of British ships on the high seas.

I am to add that in view of the difficulties of the case His Majesty's Government could not agree to an extension of the three-mile limit, even for a limited purpose, until the matter has been submitted to the Imperial Conference, which will meet within a few weeks in London.

I have (etc.)

H. G. CHILTON.

APPENDIX M

The British Chargé d'Affaires to the Secretary of State

British Embassy,
Washington, D. C., November 23, 1923.

No. 1005.

Sir: In my note to the Acting Secretary of State, No. 797, of September 17th, I had the honour to explain some of the serious difficulties felt by His Majesty's Government in agreeing to the proposals embodied in the draft treaty for the regulation of the liquor traffic which you handed to me on June 11th.

I informed Mr. Phillips in that note that various Departments of His Majesty's Government who would be concerned with the changes which such a treaty must necessarily bring about were engaged in exploring every avenue by which they might lend assistance to the Government of the United States in the obstacles they were encountering in the enforcement of the Volstead Act.

Further sympathetic consideration has been given to the whole matter in the meantime, but I am instructed to state that the attention of His Majesty's Government has been called to an important judgment of the Supreme Court of the United States handed down on April 23rd last, which seems to raise an additional difficulty that must be overcome before a treaty can be drafted in final form.

In delivering that judgment Mr. Justice Van Devanter said:

> While the construction and application of the National Prohibition Act is the ulti-

> mate matter in controversy, the Act is so closely related to the eighteenth Amendment, to enforce which it was enacted, that a right understanding of it involves an examination and interpretation of the Amendment. The first section of the latter declares,
>
> SECTION 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited.

He then proceeded to show that the Volstead Act correctly carries out the intention of the eighteenth Amendment, and then that the proper interpretation of the Act is that no ship, domestic or foreign, can carry liquor in transit within United States territorial waters. That is to say, such carriage of liquor appears to be not merely illegal but unconstitutional.

Lord Curzon was glad to receive and has weighed with the greatest care the communications you have been good enough to make to him both through the late United States Ambassador in London and through me regarding the constitutionality of the proposed treaty, and he has not overlooked the announcement made to the Press on November 2d by the President of the United States to the effect that, as Congress specifically exempted from the operation of the Act liquor in transit through the Panama Canal, it thereby recognised that the right of foreign ships to transport liquor in United States waters is not prohibited by the Constitution but merely by the Act, and that the Act can be modified by a treaty. In view, however, of the

great importance of this point Lord Curzon would be glad to receive information as to whether the right to carry liquor through the Panama Canal has ever been challenged on constitutional grounds and confirmed in the United States Courts. It has been represented to him that in the absence of such confirmation the precedent set by the legislators in the Volstead Act can not be regarded as entirely conclusive.

Resolutions adopted at recent important gatherings in the United States of business men interested in the American Mercantile Marine give foundation for the belief that legal steps may be taken in the future to question the constitutional validity of the concession which the treaty proposes to grant to British ships trading with United States ports. Should that concession be so questioned and not confirmed by the Courts, His Majesty's Government would lose the privilege in return for which they are asked to make a very important concession in relation to the right of arrest and search.

As at present advised it appears to Lord Curzon impossible to proceed with the treaty or any similar arrangement until His Majesty's Government have been favoured with authoritative assurances on this point by the Government of the United States.

I have the honour to be, with the highest consideration, Sir,

Your most obedient, humble servant,

H. G. CHILTON.

The Honourable CHARLES E. HUGHES,
Secretary of State of the United States,
Washington, D. C.

APPENDIX N

THE SECRETARY OF STATE TO THE BRITISH CHARGÉ D'AFFAIRES

NOVEMBER 26, 1923.

SIR: I have the honor to acknowledge the receipt of your note, No. 1005, of November 23, 1923, and I am gratified to observe the sympathetic consideration that His Majesty's Government is giving to the proposals embodied in the draft treaty.

It is hardly necessary to say that in these proposals there has been no intention to violate in any respect the provisions of the Eighteenth Amendment of the Federal Constitution. On the contrary, the purpose is to aid their enforcement.

In the case of the *Cunard Steamship Company, Ltd. et al.* v. *Mellon, Secretary of the Treasury, et al.* (decided April 30, 1923), to which you refer, the question of the validity of an Act of Congress, or a treaty, excepting from penalty or forfeiture intoxicating liquor carried as cargo or sealed stores not destined for delivery or consumption within the territory of the United States, but carried under seal while in transit through territorial waters, was not involved, and that decision can not be regarded as determining that question. In that case it was held that Congress, acting within its authority, had actually imposed penalties upon such carriage, and an injunction restraining the officers of the Govern-

ment from proceeding against the complaining steamship companies and their ships, under the Act of Congress as thus construed, was denied.

While the precise question raised in your note has not been decided, there are certain applicable principles which are deemed to be controlling. The Eighteenth Amendment provides:

> I. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> II. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

It is apparent that the first section provides no penalties and that these are left to appropriate legislation. As the Supreme Court of the United States has recognized, a constitutional provision "is self-executing only so far as it is susceptible of execution." (*Davis* v. *Burke,* 179 U. S. 399, 403.) As no penalties or forfeitures are prescribed in the Eighteenth Amendment itself, and Congress is empowered to enforce that Amendment by appropriate legislation, it is manifest that to the sound discretion of Congress is confided the determination of what are appropriate penalties and forfeitures. In the judgment of this Government there is no reason to doubt that in the exercise of this authority Congress may consider all the pertinent circumstances and the best means of enforcing the constitutional provision, and may thus consider it en-

tirely appropriate not to impose penalties or forfeitures with respect to intoxicating liquor which is not destined for consumption or delivery within the United States but is simply carried in transit through territorial waters.

The authority which is thus deemed to be possessed by Congress has already been exercised with respect to the transit of intoxicating liquors through the Panama Canal. There is a special provision in the Volstead Act dealing with the Canal Zone which excepts "liquor in transit through the Panama Canal or on the Panama Railroad." It is true that the validity of this exception has not been the subject of precise adjudication, but it is believed to have been fully recognized by the Supreme Court in the decision which you have cited in your note. The Supreme Court there said:

> Much has been said at the bar and in the briefs about the Canal Zone exception, and various deductions are sought to be drawn from it respecting the applicability of the Act elsewhere. Of course the exception shows that Congress, for reasons appealing to its judgment, has refrained from attaching any penalty or forfeiture to the transportation of liquor while "in transit through the Panama Canal or on the Panama Railroad." Beyond this it has no bearing here, save as it serves to show that where in other provisions no exception is made in respect of merchant ships, either domestic or foreign, within the waters of the United States, none is intended.
>
> Examining the Act as a whole, we think it shows very plainly, first, that it is intended to be operative throughout the territorial

limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside the territorial waters of the United States, and, thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise.

It will be observed that the exception is not criticized nor is it said to lie beyond the power of Congress, but it is stated that the exception shows "that Congress, for reasons appealing to its judgment, has refrained from attaching any penalty or forfeiture" to the transportation described.

It is the view of this Government that Congress has the same authority to except from penalties or forfeitures intoxicating liquor in transit through territorial waters not destined for delivery or consumption within the United States that it has to except from penalty or forfeiture intoxicating liquor in transit through the Panama Canal. Moreover, if Congress made such an exception, it is manifest that there would be no penalty or forfeiture attaching to such transit.

It is also the view of this Government that as the Constitution does not deal with penalties or forfeitures, and these remain within the law-making power, this subject can not be regarded as withdrawn from the treaty-making power. The treaty-making power is deemed to be quite as broad in this respect as the legislative power. As was said by the Supreme Court of the United States in the case of *Missouri* v. *Holland,* 252 U. S. 416, 433:

> Acts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States. It is open to question whether the authority of the United States means more than the formal acts prescribed to make the convention. We do not mean to imply that there are no qualifications to the treaty-making power; but they must be ascertained in a different way. It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, "a power which must belong to and somewhere reside in every civilized government" is not to be found.

You will not fail to observe that the part of the proposed treaty above mentioned relates only to exception from penalties and forfeitures in the particular circumstances described in the treaty and that the treaty as a whole is clearly intended to secure the better enforcement of the Eighteenth Amendment by facilitating measures to prevent the operations which have seriously interfered with that enforcement. The provisions with respect to arrest and search are to be considered in connection with the exception from penalty or forfeiture in case of liquors merely in transit.

I have, therefore, no hesitation in saying that while this Government is clearly of the opinion that the proposed treaty would have constitutional validity, there would be no attempt on the part of this Government to insist upon the provisions as

to arrest and search in opposition to the desire of His Majesty's Government to abrogate the treaty in case the proposed exception from penalty and forfeiture should either by final judicial decision or by Act of Congress become inoperative. Such abrogation would, of course, not be deemed to impair any rights possessed by this Government irrespective of the treaty.

Accept, Sir, the renewed assurance of my high consideration.

CHARLES E. HUGHES.

711.419/61.

Mr. HENRY GETTY CHILTON,
Chargé d'Affaires ad interim
of Great Britain.

APPENDIX O

Draft Treaty. Left with the Secretary of State by Mr. Chilton, British Chargé d'Affaires, December 3, 1923

1. The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles measured from low water mark constitute the proper limits of territorial waters.

2. (1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavouring to import or have imported alcoholic beverages into the United States in violation of the laws in force in that country. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States than can be traversed in one hour by the vessel suspected of endeavouring to commit the offence. In cases, however, in which the liquor is intended to be conveyed to the United States by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

3. The United States agrees to allow British vessels voyaging to or from the ports or passing through the waters of the United States to have on board alcoholic liquors listed as sea stores or as cargo destined for a foreign port, provided that such liquor is kept under seal while within the jurisdiction of the United States.

4. Any claim by a British vessel for compensation on the ground that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by article 2 of this treaty or on the ground that it has not been given the benefit of article 3 shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington on August 18, 1910, but the claim shall not, before submission to the Tribunal, require to be included

in a schedule of claims confirmed in the manner therein provided.

5. This treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its desire to propose modifications in the terms of the treaty.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the treaty shall lapse.

If no notice is given on either side of the desire to propose modifications, the treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the treaty shall lapse.

6. In the event of either of the High Contracting Parties being prevented by difficulties of a constitutional nature from giving full effect to the provisions of the present treaty, the said treaty shall automatically lapse.

APPENDIX P

Aide Mémoire by the Secretary of State Handed to the British Chargé d'Affaires

December 7, 1923.

The Secretary of State has carefully considered the draft proposed by His Majesty's Government of the treaty relating to alcoholic liquors. While the Government of the United States would have preferred that the distance for the purposes of search and seizure be more definitely delimited, it has been concluded, in view of the evident desire of the British Government to attain the object in view and of the importance of an early disposition of the matter, not to raise objections to the provisions contained in Articles 2, 4, and 5 of this draft, save to add the words ", its territories or possessions" after the words "United States" in Article 2.

There are, however, certain modifications in the other articles which are deemed to be important.

Article I

In order to avoid a detailed statement with respect to ports, bays, harbors, et cetera, it is desired that in Article I after the words "three marine miles" there should be inserted the words "extending from the coast line outward and", so that Article I shall read as follows:

> I. The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending

from the coast line outward and measured from low water mark constitute the proper limits of territorial waters.

Article 3

In the communication addressed by the Secretary of State to the British Chargé d'Affaires ad interim under date of November 26, 1923, the question of the constitutional validity of the proposed treaty was considered and it was pointed out that the lawmaking power of Congress and the treaty-making power were deemed to extend under the Eighteenth Amendment of the Federal Constitution to the determination of penalties or forfeitures and such exceptions thereto as might be deemed to be appropriate in view of all the pertinent circumstances and after consideration of the best means of enforcing the constitutional provision. It is important, however, that the provision of the treaty upon this point should clearly reflect this view and should relate to an exception from penalties and forfeitures. To leave no room for question as to the intent, it is deemed advisable to refer to the existing exception in the case of transit through the Panama Canal. For these reasons the Government of the United States proposes that Article 3 of the proposed treaty shall be amended to read as follows:

> 3. No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors, or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States its territories or posses-

sions on board British vessels voyaging to or from ports of the United States or its territories or possessions, or passing through the territorial waters thereof, and such transit through such waters shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

Article 6

While the Government of the United States would have preferred that the treaty should be subject to denouncement in the event under consideration, it is understood that His Majesty's Government strongly desire not to have a provision for denouncement but instead to have a provision for the automatic lapsing of the treaty in the event described. The Government of the United States will not oppose this view; but it is deemed that there should be a modification of the text of the proposed article in the following particulars. The expression "difficulties of a constitutional nature" is thought to be too indefinite. Such difficulties, if they arose, would be presented by a judicial decision upon the question and it is desired that the reference should be not to "constitutional difficulties" but to "judicial decision" which would prevent giving full effect to the provisions of the treaty. Moreover, there is also the question of legislation subsequently enacted by Congress and this

contingency, while deemed to be remote, should be covered by the article. It is also desired to have a specific statement as to the full retention of rights on the termination of the treaty. For these reasons it is proposed that Article 6 shall read as follows:

> 6. In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present treaty, the said treaty shall automatically lapse, and, on such lapse or whenever this treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this treaty not been concluded.

It is hoped that with these modifications the treaty as proposed may be concluded at an early date.

DEPARTMENT OF STATE,
Washington.

APPENDIX Q

THE BRITISH CHARGÉ D'AFFAIRES TO THE SECRETARY OF STATE

BRITISH EMBASSY,
Washington, D. C., January 2, 1924.

No. 5—Urgent.

SIR: Under instructions from His Majesty's Principal Secretary of State for Foreign Affairs, I have the honour to draw your attention to certain statements made on behalf of the President of the United States and reported by the correspondents of the Morning Post and Daily Telegraph in Washington to those newspapers in England, in regard to the attitude of the United States Government in the matter of the seizure, outside the three-mile limit, of foreign vessels which are suspected of acting in violation of the Prohibition Law. According to these reports the view of the President is stated to be

> that the United States have never relinquished the right to seize ships whether within or without the three-mile limit which have discharged their cargoes in violation of United States law.

The Daily Telegraph further reported that

> At the White House the statement is authorised that the President believes that the "Tomoka" case comes under the scope of the decision of the United States Circuit Court

for Appeals in New York in the case of the "Henry L. Marshall" captured nine miles off shore. In that case, the Presidential spokesman pointed out that the "Henry L. Marshall" was discharging liquor cargo and was in contact with the shore. The British Government protested in the "Marshall" case, but withdrew its protest when it was shown that the registry of the vessel was defective.

If the above reports are correct it would appear that the President of the United States now reasserts the claim of the United States Government to seize foreign ships outside the three-mile limit if they have established contact with the shore for illegal purposes. His Majesty's Government realize that in August last Judge Woodrough in the Federal District Court at Brookyln upheld the seizure of a British vessel outside the three-mile limit on the grounds that she was hovering off the American coast for smuggling purposes and had had contact with the shore. His Majesty's Government are not, however, aware that the Supreme Court have yet considered Judge Woodrough's judgment, and His Majesty's Government have therefore been under the impression that the previous policy of the United States Government not to seize foreign vessels outside the three-mile limit, which was adopted before that judgment, still held good. In these circumstances and in order to clear up the present ambiguous situation, I have been instructed by my Government to ask you to be so good as to communicate to me, at your earliest convenience, an authoritative statement as to the present policy of the United States Government on this question.

At the same time His Majesty's Government desire me to point out that the statement emanating from the White House, above referred to, in connection with the *Henry L. Marshall case* seems to imply that the United States Government infer that the absence of a protest by His Majesty's Government against the seizure of the *Henry L. Marshall* showed that His Majesty's Government acquiesce in the seizure of British vessels outside the three-mile limit. But I would remind you that it was precisely in order to eliminate any such inference or any doubt on the part of the United States Government as to the attitude of His Majesty's Government in regard to the principle involved that I addressed to you my note No. 578 of July 10th last.

As the United States Government still appear to be under some misapprehension on this point, I have been instructed by my Government to reaffirm their position as explained in my note above-mentioned and to state that the absence of a protest by His Majesty's Government in the case of the *Henry L. Marshall* did not mean that they acquiesce in seizures outside territorial waters, that, on the contrary, the position of His Majesty's Government remains unchanged on the question of principle, and that they still regard such seizures as creating a serious situation.

Having made clear to you the attitude of His Majesty's Government, I have the honour to emphasize the importance which they attach to being informed as soon as possible of the policy of the United States Government on this question, especially in view of a further case of the seizure

by the United States authorities of a British vessel on the high seas having recently arisen. The case to which I refer is that of the British schooner *Tomoka*. This vessel was seized by the United States authorities on November 24th about six miles from the shore The *Tomoka* was first registered at Nassau, Bahamas, on April 24th, 1921, and was again registered there when an auxiliary engine was installed on March 30th, 1923. The *Tomoka* was originally owned by the British Transportation & Trading Company of Nassau, but was sold in January, 1923, to the Ocean Trading Company of Halifax, Nova Scotia, the present owners of the vessel. The Ocean Trading Company is a Canadian Company, incorporated under the laws of Nova Scotia, and the President and Secretary of the Company are Canadian subjects. I am informed that at the time of the seizure of the *Tomoka* her crew included seven British subjects. Although more than four weeks have passed since the seizure occurred, I understand that the vessel is still detained and the crew held under bond by the United States authorities at New York.

I have been instructed by my Government to enquire the reasons for the action of the United States authorities in pursuing and seizing this British vessel and her British crew on the high seas and in detaining them in New York, and further to ask that if the facts are as stated above you will be so good as to cause the competent authorities to take steps to effect the release of the British members of the crew without delay.

I have the honour to request the favour of an early reply not only as to the specific case of the

Tomoka but also as to the general question of the present policy of the United States Government in the matter of the seizure of foreign vessels outside the limit of United States territorial waters. I have the honour to be with the highest consideration, Sir,

Your most obedient, humble servant,

HWB/Mc. (Signed) H. G. CHILTON.

The Honourable CHARLES E. HUGHES,
Secretary of State of the United States,
Washington, D. C.

APPENDIX R

THE SECRETARY OF STATE TO THE BRITISH AMBASSADOR

JANUARY 22, 1924.

EXCELLENCY: I have the honor to acknowledge the receipt of Mr. Chilton's note No. 5, dated January 2, 1924, concerning the seizure of British vessels engaged in smuggling liquor into the United States from outside the three-mile limit. Mr. Chilton referred to reports published in British newspapers concerning statements made on behalf of the President of the United States respecting such seizures, and he requested an authoritative statement as to the policy of the United States Government on this question.

He referred to his note No. 578 of July 10, last, concerning the seizure of the schooner *Henry L. Marshall* while operating under the British flag outside the three-mile limit of the United States, and stated that "absence of a protest by His Majesty's Government in the case of the *Henry L. Marshall* did not mean that they acquiesce in seizures outside territorial waters, that, on the contrary, the position of His Majesty's Government remains unchanged on the question of principle, and that they still regard such seizures as creating a serious situation." As has been observed before, I have taken it for granted that your Government did in fact make protest of the seizure of the *Henry L. Mar-*

shall through your notes of August 11 and September 9, 1921.

It is far from my purpose to enter into a detailed review of the correspondence with your Embassy concerning the several cases of seizure which have arisen. I would merely advert briefly to certain facts which, it is believed, suffice to explain the position of my Government:

First: I endeavored to state succinctly the principles on which my Government has asserted rights of seizure and condemnation in my note to your Embassy of July 16, last, concerning the case of the *Henry L. Marshall.*

Secondly: The desire which I expressed in the last paragraph of that note for an indication of the disposition of His Majesty's Government as to the espousal of the cause of a British merchant vessel engaged in an effort unlawfully to introduce intoxicating liquors into the territory of the United States in the manner adopted by the schooner *Henry L. Marshall* has, as yet, met with no response on the part of His Majesty's Government.

As Mr. Chilton made special inquiry with reference to the facts and conditions surrounding the case of the *Tomoka,* I take pleasure in setting forth at length for the confidential information of your Government, what official investigations have revealed.

The *Tomoka* was formerly the American yacht *Arethusa* owned by William F. McCoy. With reference to Mr. Chilton's statement that the *Tomoka* was first registered at Nassau, Bahama Islands, on April 24, 1921, I may state that the sale of the schooner-yacht *Arethusa,* Official No. 204604, by

William F. McCoy to Charles E. Albury, with change to British registry was authorized by the United States Shipping Board on April 25, 1921. The *Arethusa* was first registered under the British flag on June 6, 1921, with Charles Eugene Albury, an impecunious British subject temporarily residing at Miami, Florida, named as owner. A mortgage on the schooner for two thousand pounds, dated May 28, 1921, from Charles E. Albury, to William F. McCoy of West Palm Beach, Florida, was placed on record at Nassau on June 7, 1921. A discharge of the mortgage for two thousand pounds given by Mr. Albury to William F. McCoy, dated April 11, 1922, was recorded at Nassau on April 13, 1922. I understand that no steps were taken to obtain the approval of the Board of Trade in compliance with the provisions of the British Ships (Transfer Restrictions) Act of August 23, 1916, a copy of which was enclosed with Mr. Chilton's note No. 907, dated October 24, 1923.

By a bill of sale dated March 14, 1922, and recorded at Nassau on April 13, 1922, the *Arethusa* was transferred by Charles E. Albury to the British Transportation and Trading Company, Limited, Nassau. The information I had received regarding the American ownership of this company was set forth in the note I addressed to you on February 26, 1923, and I inquired whether, in case it was found that the actual interest in the company was American, your Government would be disposed to take any steps to prevent the use of the British flag on ships belonging to the company for the purpose of avoiding seizure of its vessels by the agents of the United States for violation of its laws. In

his note No. 907, dated October 24, 1923, Mr. Chilton replied as follows:

> As to (1) in March and April last a thorough investigation was made into the status of the British Transportation and Trading Company by the appropriate authorities in the Bahamas, and it was ascertained that the Company was incorporated in Nassau on November 30th, 1921, and that the following persons comprised the directorate thereof: William Frederick McCoy, President; Maud McCoy (wife of William F. McCoy), Treasurer and Secretary; Peter Diamond and Bruce Kilroy Thompson. As far as is known, all of these persons, with the exception of the last named, were American citizens. At the time the investigation was made the Company had, however, no vessels registered at Nassau, their only vessel (the *Tomoka,* official No. 151267) having lately been sold to the Ocean Trading Company of Halifax, Canada. In these circumstances His Majesty's Government are of the opinion that the question raised in your note under reply and quoted under (1) ceased to be of practical interest.

With respect to the Ocean Trading Company, the alleged present owner of the schooner *Tomoka,* to whom you state it was sold in January, 1923, and which you state is a Canadian Company incorporated under the laws of Nova Scotia, the President and Secretary being Canadian subjects, I may state that information has been received that the Ocean Trading Company, Limited, was incorporated on January 30, 1923, under the Nova Scotia Companies Act. I enclose a copy of the "Mem-

orandum of Association of Ocean Trading Company, Limited." I also enclose a copy of an agreement dated January 30, 1923, between the British Transportation and Trading Company, Limited, of Nassau, and the Ocean Trading Company, Limited, of Halifax, whereby the schooner *Tomoka* with all her gear, stores and other effects was transferred to the Ocean Trading Company. Your attention is invited to the fact that Article 2 of the Agreement reads as follows:

> The consideration of the said sale shall be $50,000.00, which shall be paid and satisfied as follows: As to $300.00 by payment of that amount in cash and as to the balance of $49,700.00, by the allotment to the vendor or their nominees, of 497 fully paid shares in the capital stock of the Company of the par value of $100.00 each.

I am informed that the Nova Scotia Companies Act provides as follows:

> Any three or more persons associated for any lawful purpose other than a banking, a loan, a trust or an insurance company, may, by subscribing their names to a memorandum of association and otherwise complying with the requirements of this Act in respect of registration, form an incorporated company, with or without limited liability.

You will observe that in this case there was, therefore, a bare technical compliance with the law, as the Memorandum of Association was signed by three persons, each of whom held, or appeared to hold, one share in the Company.

I also understand Part IV, paragraph 74, of the Nova Scotia Companies Act requires every company to keep at its registered office, "a register

containing the names and addresses, and the occupations of its directors or managers," and to "send to the Registrar, a copy thereof, and from time to time notify to the Registrar any change among its directors or managers." It is stated that the Company has not complied with this section of the law.

The Nova Scotia Companies Act also is said to require the Company to keep at its registered office a register of its members, with certain particulars, which register "shall, during business hours * * * be opened to the inspection of any member gratis, and to the inspection of any other person on payment of twenty-five cents, or such less sum as the Company may prescribe, for each inspection." When request was made for permission to examine the register of members at the registered office of the Company, 605–609 Barrington Street, Halifax, Mr. Fred M. Morris, who signed the agreement above mentioned as President of the Ocean Trading Company, stated that he was not a member of the Company. I am informed that the public records showed him to be a member and gave that address as the registered address of the Company. He replied, on the advice of his employer, Mr. Howard Wentzell, that the register of the Company was in the hands of their attorneys, and that he would at once take up the matter with them. Subsequent inquiry at the office of McLean, Burchell and Ralston, Attorneys, brought forth the statement that they had acted only in the incorporation of the Ocean Trading Company, Limited, that they had no register of the employees and did not care to be concerned in the matter. Inquiry was also made of

Mr. E. M. Ritcey, who is accorded as Secretary of the Company, but he stated that he had no register of the Company and that he was no longer a member of it, having sold his one share the same date he acquired it.

The address given in the public records as the registered place of business of the Ocean Trading Company, Limited, is, in fact, the place of business of Howards, Limited, wholesale brokers and ship chandlers. Fred M. Morris, E. M. Ritcey, and Fred C. Worrigan, whose signatures appear on the Memorandum of Association above mentioned, are clerks employed by Howards, Limited. Furthermore, I am informed that McCoy requested Mr. Wentzell, to recommend a firm of attorneys to draw up some papers, and that Mr. Wentzell sent him to McLean, Burchell and Ralston, and it is stated that a member of that firm suggested the young men in the store of Howards, Limited, as incorporators for the Company McCoy wished to form. It seems clear that the President and Secretary of the Ocean Trading Company referred to in Mr. Chilton's note are merely figureheads, that the Company has failed to comply with the laws of Nova Scotia in several respects, and that it is evidently an organization formed merely to cloak the actual operation of the *Tomoka* by McCoy under the British flag. The foregoing facts surrounding the case compel the conclusion that the vessel was in realty an American ship and justified the authorities of this Government in dealing with it as such.

Reference is made in this connection to the judgment of the Lords of the Judicial Committee of the Privy Council concerning the condemnation of the

steamships *Kankakee, Hocking* and *Genesee,* operated under American registry and claimed by the American Transatlantic Company, a company organized under the laws of the State of Delaware. The judgment was delivered on July 23, 1920, and is reported in Lloyd's List Law Reports, Trinity Sittings, 1920, Volume 4, Page 355. The Privy Council found that the American Transatlantic Company was controlled and financed from Germany, and that the steamers were, therefore, liable to condemnation.

The conduct of persons on board the *Tomoka* prior to its seizure is illustrated by the fact that on August 22, 1923, shortly before ten o'clock, p. m., the *Tomoka* opened fire on a motor boat belonging to the Coast Guard cutter *Manhattan,* while on patrol duty off the entrance to New York Harbor. Just before opening fire a searchlight was turned on the boat clearly illuminating it and the men in it so that the boat was known to the persons on board the *Tomoka.*

The *Tomoka* was seized six miles at sea off Seabright, New Jersey, on November 24, 1923, having 135 cases of liquor on board. Her clearance from Hamilton, Bermuda, showed that she left the port on November 12, 1923, with 449 cases of liquor. The remaining cases of liquor are understood to have been landed in the United States. At the time of the seizure, McCoy was on board and in active charge of the schooner. After the Coast Guard crew went aboard the *Tomoka* he directed the crew of the *Tomoka* not to go to New York but to go to sea, which they attempted to do. Thereupon the Coast Guard took command of the *Tomoka.* * * *

[Certain immaterial matter relating to an individual omitted in printing.]

With respect to the legal proceedings that have been instituted against the *Tomoka* and the members of her crew, I enclose for your confidential information extracts from the report of the officer in charge of these proceedings. You will observe that no unnecessary delay has occurred in these proceedings and that such delay as has taken place has been due to the refusal of members of the crew to give testimony. I shall keep you informed of further developments in the trial of the case and of the result of it.

In conclusion, I can not refrain from expressing the hope that His Majesty's Government, in view of the facts above set forth, may not feel obliged to regard the *Tomoka* as a British vessel entitled to the protection of the British flag.

Accept, Excellency, the renewed assurances of my highest consideration.

CHARLES E. HUGHES.

His Excellency The Right Honorable Sir AUCKLAND GEDDES, G. C. M. G., K. C. B., *Ambassador of Great Britain.*

Enclosures:

Copy of Memorandum of Association of Ocean Trading Company, Limited.

Copy of Agreement.

Extracts from report.

311.4153 T 59/20.

(Enclosures omitted in printing.)

U. S. GOVERNMENT PRINTING OFFICE: 1938

SUPREME COURT OF THE UNITED STATES.

No. 82.—October Term, 1932.

Frank Cook, Petitioner, *vs.* The United States of America. } On Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[January 23, 1933.]

Mr. Justice Brandeis delivered the opinion of the Court.

The main question for decision is whether section 581 of the Tariff Act of 1930, c. 497, 46 Stat. 590, 747, is modified, as applied to British vessels suspected of being engaged in smuggling liquors into the United States, by the Treaty between this country and Great Britain proclaimed May 22, 1924. (43 Stat. 1761.) That section—which is a re-enactment in identical language of § 581 of the Tariff Act of 1922, c. 356, 42 Stat. 858, 979—declares that officers of the Coast Guard are authorized to stop and board any vessel at any place within four leagues [12 miles] of the coast of the United States "to examine the manifest and to inspect, search and examine" the vessel and any merchandise therein; and if it shall appear that any violation of any law of the United States has been committed by reason of which the vessel or merchandise is liable to forfeiture, it shall be the duty of such officers to seize the same.

On the evening of November 1, 1930, the British motor screw Mazel Tov—a vessel of speed not exceeding 10 miles an hour—was discovered by officers of the Coast Guard within four leagues of the coast of Massachusetts and was boarded by them at a point 11½ miles from the nearest land. The manifest was demanded and exhibited. Search followed, which disclosed that the only cargo on board, other than ship stores, was unmanifested intoxicating liquor which had been cleared from St. Pierre, a French possession. The vessel, ostensibly bound for Nassau, a British possession, had, when boarded, been cruising off our coast with the intent that ultimately the liquor should be taken to the United States by other boats. But the evidence indicated that she did not intend to approach nearer than four leagues to our coast; and, so far as appeared, she had not been in communication with our shores and had not unladen any part of her cargo. The boarding

officers seized the Mazel Tov at a point more than 10 miles from our coast; took her to the Port of Providence; and there delivered the vessel and cargo to the customs officials.

The Collector of Customs, acting pursuant to § 584 of the Tariff Act of 1930, assessed against Frank Cook, as master of the Mazel Tov, a penalty of $14,286.18 for failure to include the liquor in the manifest. By § 584, if merchandise not described in the manifest is found on board a vessel "bound to the United States", the master is subject to a penalty equal to its value, and the merchandise belonging or consigned to him is subject to forfeiture. By § 594, whenever a master becomes subject to a penalty, the vessel may be seized and proceeded against summarily by libel to recover the penalty. The Government proceeded, in the federal court for Rhode Island, to collect the assessed penalty by means of libels against both the cargo and the vessel. The cases were consolidated.

Cook, claiming as master and bailee of the vessel and as consignee and claimant of the cargo, alleged that the Mazel Tov was of British registry and owned by a Nova Scotia corporation. He answered to the merits; and excepted to the jurisdiction on the ground that the "vessel was not seized within the territorial limits of any jurisdiction of the United States, but, on the contrary, was captured and boarded at a point more than four (4) leagues from the coast," and that "it was not the intention at any time to enter any of the territorial limits of the United States."

The District Court, having found the facts above stated, dismissed the libels. 51 F. (2d) 292. The Government appealed to the Circuit Court of Appeals, which held that the Treaty did not "effect a change in the customs-revenue laws of the United States wherein Congress had fixed a four league protective zone"; reversed the judgments; and remanded the cases to the District Court for further proceedings. 56 F. (2d) 921. This Court granted certiorari.[1] 287 U. S. —.

[1]The view that the Treaty modified the limits within which British vessels might be seized for violation of the laws prohibiting alcoholic liquors is supported by the following cases: The Frances Louise, 1 F. (2d) 1004; The Marjorie E. Bachman, 4 F. (2d) 405; The Sagatind, 11 F. (2d) 673, 675; The Over the Top, 5 F. (2d) 838, 844; Ford *v.* United States, 10 F. (2d) 339, 347, affirmed, 273 U. S. 593; Hennings *v.* United States, 13 F. (2d) 74, 75; United States *v.* Ferris, 19 F. (2d) 925, 926; United States *v.* Schouweiler, 19 F. (2d) 387; compare United States *v.* Cargo ex British Schooner

Cook contends, among other things, that by reason of the Treaty between the United States and Great Britain proclaimed May 22, 1924 (43 Stat. 1761), the seizure was unlawful under the laws of the United States; that the authority conferred by § 581 of the Tariff Act of 1922 to board, search and seize within the four league limit, was, as respects British vessels,[2] modified by the Treaty so as to substitute for four leagues from our coast, the distance which "can be traversed in one hour by the vessel suspected of endeavoring to commit the offense"; that Congress by re-enacting § 581 in the Tariff Act of 1930 intended to continue in force the modification effected by the Treaty; and, hence, that the Mazel Tov, being a British vessel of a speed not exceeding 10 miles an hour, could not be lawfully boarded, searched and seized at a distance of 11½ miles from the coast because suspected of "endeavoring to import or have imported alcoholic beverages into the United States in violation of the laws there in force."

The Government insists that the Treaty did not have the effect of so modifying § 581 of the Act of 1922; and that, if it did, the

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Patara, 40 F. (2d) 74. In other cases the view has been expressed that the treaties did not restrict, at all events, the right of seizure. The Vinces, 20 F. (2d) 164, 174, affirmed sub nom. Gilliam *v.* United States, 27 F. (2d) 296 (compare *id.*, p. 301); The Panama, 6 F. (2d) 326, 327; The Resolution, 30 F. (2d) 534, 537-538; The Pescawha, 45 F. (2d) 221, 222. Compare, also, the following cases in which seizure was made within twelve miles but in which it does not appear whether it was made within an hour's sailing distance or whether the question of the effect of the treaties was raised. The Mistinguette, 27 F. (2d) 738; United States *v.* 63 Kegs of Malt, 27 F. (2d) 741; The Newton Bay, 30 F. (2d) 444, affirmed, 36 F. (2d) 729; The Amaranth, 35 F. (2d) 872; The Marion Phillis, 36 F. (2d) 688; The Deauville, 49 F. (2d) 372; The Throndyke, 53 F. (2d) 239; The Miss C. B., 59 F. (2d) 744.

[2]Similar treaties have been entered into with fifteen other countries Norway, July 2, 1924 (43 Stat. 1772); Denmark, July 25, 1924 (43 Stat. 1809); Germany, August 11, 1924 (43 Stat. 1815); Sweden, August 18, 1924 (43 Stat. 1830); Italy, October 22, 1924 (43 Stat. 1844); Panama, January 19, 1925 (43 Stat. 1875); Netherlands, April 8, 1925 (44 Stat. 2013); Cuba, June 19, 1926 (44 Stat. 2395); Spain, November 17, 1926 (44 Stat. 2465); France, March 12, 1927 (45 Stat. 2403); Belgium, January 11, 1928 (45 Stat. 2456); Greece, February 18, 1929 (45 Stat. 2736); Japan, January 16, 1930 (46 Stat. 2446); Poland, August 8, 1930 (46 Stat. 2773); Chile, November 26, 1930 (46 Stat. 2852). The only substantial difference in these treaties is in Article One, dealing with the general principle of a three-mile limit; in the treaties with Great Britain, the Netherlands, Germany, Cuba, Panama and Japan, the principle is declared to be accepted, while in the others rights and claims in that regard are declared to be reserved.

re-enactment of § 581 without change, by the Act of 1930, removed the alleged modification. It contends further that the validity of the seizure was not material; and if ever material had been waived.

The Treaty provides, among other things, as follows:

"Article I. The High Contracting Parties declare that it is their firm intention to uphold the principle that 3 marine miles extending from the coast line outwards and measured from low-water mark constitute the proper limits of territorial waters.

"Article II. (1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

"(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

"(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised."

We are of opinion that the decrees entered by the District Court should have been affirmed.

First. It is suggested on behalf of the Government that the power to search and seize within the twelve-mile zone, conferred upon officers of the Coast Guard by section 581 of the Tariff Act of 1922, was unaffected by the Treaty, save that the British Government agreed not to protest where the seizure was within an hour's sailing distance of the coast. The argument is that the Treaty settled the validity of the seizure only for those cases where it was made within the limits described in the Treaty; and that since this

seizure was made beyond one hour's sailing distance from the coast the Treaty did not apply.[3] In construing the Treaty its history should be consulted. Compare *United States* v. *Texas*, 162 U. S. 1; *Oklahoma* v. *Texas*, 260 U. S. 606; *Nielsen* v. *Johnson*, 279 U. S. 47, 52. Both its language and its history show that the high contracting parties did not intend so to limit its operation. The preamble states that they entered into the Treaty "being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of alcoholic beverages." The history reveals that serious differences had arisen between the two Governments in that connection; and that, for the purpose of resolving them, the parties determined to deal completely with the subject of search and seizure, beyond our territorial limits, of British vessels suspected of smuggling loquors.

Prior to the Eighteenth Amendment the United States had never attempted, in connection with the enforcement of our customs laws, to board foreign vessels beyond the three-mile limit except where consent was implied from the fact that the vessel, being hailed, answered that she was bound for the United States, or where a vessel had been discovered violating our laws within the three-mile limit and, while endeavoring to escape, was hotly pursued. Although Hovering Acts conferring authority to board and search vessels, foreign and domestic, "within four leagues of the coast", had existed since the foundation of our Government, see Act of August 4, 1790, c. 35, § 31, 1 Stat. 145, 164,[4] the author-

[3]The argument was advanced by the Solicitor General as representing the view not of the Department of Justice but of other lawyers for the Government.

[4]Re-enacted by Act of March 2, 1799, c. 22, § 71, 1 Stat. 627, 668; and see Rev. Stat. § 3067.

The model for the American statutes was the British Hovering Act of 1736, 9 Geo. II, c. 35, § 23, which provided for the forfeiture of vessels under 100 tons into which foreign goods were taken within four leagues of the coast. Compare the earlier British Hovering Acts of 1709 and 1718: 8 Anne, c. 7, § 17; 5 Geo. I, c. 11. In 1876 all existing hovering acts were repealed by the Customs Consolidation Act, 39 & 40 Vict., c. 36, which provides in section 159 for the forfeiture of vessels belonging in whole or in part to British subjects or having half the persons on board British subjects, where the vessel is found, or discovered to have been, within three leagues of the coast; and for the forfeiture of other vessels found, or discovered to have been, within one league of the coast. For the development of the British law, see William E. Masterson, Jurisdiction in Marginal Seas, pp. 1-173.

ity therein conferred had, prior to the Tariff Act of 1922, been in terms limited to inbound vessels; and no statute had purported to confer authority to seize foreign vessels beyond our territorial waters for violation of any of our laws, except in those few instances in which Congress acted pursuant to specific treaties.[5] But soon after the Eighteenth Amendment took effect (January 16, 1920), vessels of British registry were found to be engaged in smuggling intoxicating liquors into the United States in violation of our laws.[6] In the effort to prevent such violations British vessels were being boarded, searched and seized beyond the three-mile limit;[7] and by § 581 of the Tariff Act of 1922 Congress undertook to sanction such action through enlarging the authority to board, search and seize beyond the three-mile limit so as to include foreign vessels although not inbound.[8]

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[5]For those acts, see Maul *v.* United States, 274 U. S. 501, 517, note 18.

[6]The note of the Secretary of State of June 26, 1922, to the British Ambassador, recites "that many of the ships engaged in the illegal smuggling of liquor into the United States are registered under the British flag and that large quantities of liquor are carried by such vessels" from British possessions. Dept. of State Press Release, February 16, 1927.

[7]The Henry L. Marshall (286 Fed. 260, 262) was seized August 12, 1921; the Grace and Ruby (283 Fed. 475) on February 23, 1922; the Marion L. Mosher on July 27, 1923 (United States *v.* United States Fidelity & Surety Co., unreported, decided August 13, 1923, in the District Court for the Eastern District of New York); the Louise F. (293 Fed. 933), on November 5, 1923; the Island Home (13 F. (2d) 382), on November 24, 1923; the Muriel E. Winters (6 F. (2d) 466), on January 6, 1924. For notices of other seizures of this kind, not resulting in adjudication, see Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, pp. 254-256.

In reply to a question in the House of Commons on June 6, 1923, concerning the number of British vessels seized, the Undersecretary of State for Foreign Affairs replied: "Broadly speaking, some 20 or 25 cases are known to His Majesty's Government where vessels, mostly of Canadian registry, have been seized. The seizures have occurred at varying distances from the shore, some within and some without the three-mile limit. The crews have nearly always been detained for varying periods. His Majesty's Embassy at Washington have acted repeatedly, and in the strongest possible manner, to secure the release of vessels seized outside the three-mile limit, or inside it when a genuine case of distress seemed to be made out." 164 Parliamentary Debates (Commons), 5th series, col. 2212.

[8]See Congressional Record, Vol. 62, Part 11, 67th Cong., 2d Sess., p. 11,593. An amendment to § 581, as reported, was proposed and withdrawn; the amendment would have made the section applicable specifically to searches and seizures for violation of the laws prohibiting alcoholic liquors. As enacted,

Both before and after the passage of the Tariff Act of 1922 it was the consistent policy of our Government to release, upon protest, all British vessels seized beyond the three-mile limit and not bound to the United States, unless it appeared that the hovering vessel had, by means of her own small boats and crew, assisted in landing there contraband goods.[9] Our Government deemed that exception an essential to the enforcement of our laws and consistent with the principles of international law.[10] But the British Government declined to acquiesce in the propriety of the exception; declared that our practice of seizing vessels under those circumstances was not in harmony with the law of nations;[11] protested against the seizure of any British vessel outside of the three-mile limit;[12] and stated that insistence upon the practice would be regarded as creating "a very serious situation".[13]

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however, the section did not fall short of the powers which the amendment would have granted in more particular terms. See Philip C. Jessup, The Law of Territorial Waters and Maritime Jurisdiction, p. 214.

[9]See Report of the Attorney General, 1923, pp. 89-90. The practice was adopted of requiring a bond, on release, conditioned on the delivery of the cargo to the ports named in the clearance papers. *Ibid.* The class of vessels not released was extended, in the case of the Henry L. Marshall, to include a vessel beyond the three-mile limit, where, although the small boats were not the vessel's own, there was unity of control over the vessel and boats. 286 Fed. 260, affirmed, 292 Fed. 486.

[10]A statement of the American position is contained in a communication from the Secretary of State to the American Chargé d'Affaires ad interim in London, dated August 25, 1923. MS. Records, Dept. of State. And see the communication of the Secretary of State to the British Ambassador, January 18, 1923, in which the American position is declared to be supported by the view of the British Government concerning the seizure by the Russian authorities in 1888 of the British schooner Araunah (82 British and Foreign State Papers, p. 1058). Dept. of State Press Release, February 16, 1927. See, also, the address of the Secretary of State before the Council of Foreign Relations, on January 23, 1924, printed in 18 American Journal of International Law, p. 229.

[11]The British Government stated that by the Customs Consolidation Act of 1876 "British municipal legislation is made to conform with international law." Note of July 14, 1923, MS. Records, Dept. of State. For the Act, see note 4, *supra.*

[12]The British Ambassador to the Secretary of State, December 30, 1922, Dept. of State Press Release, February 16, 1927.

[13]The British Chargé d'Affaires ad interim to the Secretary of State, July 10, 1923, Dept. of State Press Release, February 16, 1927.

With a view to removing the British objections, the Secretary of State proposed, on June 26, 1922, that a treaty be entered into "under which the authorities of each nation would be authorized to exercise beyond the three-mile limit of territorial waters a measure of control over vessels belonging to the other" and which would include specifically "reciprocal provisions authorizing the authorities of each Government to exercise a right of search of vessels of the other beyond the three-mile limit of territorial waters to the extent of twelve miles from the shore."[14] The British Government declined definitely to entertain any such proposal.[15]

The decision rendered by this Court on April 30, 1923, in *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, led to the resumption of negotiations. It was there decided that the National Prohibition Act applied to all merchant vessels, foreign or domestic, within the territorial waters of the United States, and that the carrying of intoxicating liquors, either as cargo or as sea stores, through the territorial waters or into the ports and harbors of the United States is forbidden by that Act and the Eighteenth Amendment. The embarrassment to British vessels and trade threatened by this decision was serious.[16] Recognizing the urgent need of some arrangement between the two Governments which would permit the conduct by the British of legitimate trade and remove this obstacle to the operation of their vessels in the accustomed manner, the Secretary of State submitted to Great Britain, on June 11,

[14]Letter to the British Ambassador, June 26, 1922, Dept. of State Press Release, February 16, 1927.

[15]The British Ambassador to the Secretary of State, October 13, 1922, Dept. of State Press Release, February 16, 1927.

[16]On May 25, 1923, the British Ambassador addressed a note to the Secretary of State protesting against the application of the principle announced in this decision. A reply to this note was sent to the British Ambassador on June 6, 1923. MS. Records, Dept. of State. The British position was stated at length by Lord Curzon in the House of Lords on June 28, 1923. 54 Parl. Deb. (Lords), 5th series, cols. 721-729.

Protests were likewise sent by the Italian Government, on May 29, 1923; by the Belgian Government, on May 28, 1923; by the Netherlands Government, on June 1, 1923; by the Norwegian Government, on June 7, 1923; by the Portugese Government, on July 25, 1923; by the Swedish Government, on May 31, 1923; and by the Danish Government, on June 1, 1923. Dept. of State Press Release, February 16, 1927.

1923, the draft of a treaty designed to remove the friction between the two Governments. The draft did not refer specifically to intoxicating liquors. Article I provided, in general terms, that the authorities of each country should "within the distance of twelve geographical miles from its coasts" be permitted to board and search private vessels of the other to ascertain whether such vessels were engaged in an attempt to violate its laws "prohibiting or regulating the unloading near, or importation into its territories of any article;" and "if there is reasonable cause for belief" that the vessel is so engaged to seize it. Article II, likewise, in general terms, provided that articles on private vessels of either nation listed as sea stores, or as cargo destined to a foreign port, the importation of which is prohibited, might be brought within the territorial waters of the other on condition that they be sealed "upon arrival of the vessel so destined within twelve geographical miles of the coasts" and be kept sealed continuously thereafter while within the territorial waters.

This proposal of the Secretary of State also failed to meet with the approval of the British Government because it was regarded as involving an extension of the limits of the territorial waters.[17] The negotiations were, however, continued; and ultimately the British Government submitted a counter-proposal, which sought to achieve the same results by different means. The British draft provided that the high contracting parties should declare "their firm intention to uphold the principle that three marine miles measured from low water mark constitute the proper limits of territorial waters"; and avoiding all language which could possibly indicate a contrary purpose, it made no reference to the twelve-mile limit. Moreover, the arrangement, instead of applying generally to merchandise subject to prohibitory or regulatory laws, was to be limited specifically to intoxicating liquors; and no reciprocal rights were to be conferred. Each country was to secure the immunity required to satisfy its peculiar need. The need of the United States was to be met by providing that His Britannic Majesty "will raise no objection to the boarding", etc., outside the territorial waters at no "greater distance from the coast of the United States than can be

[17]The British Chargé d'Affaires ad interim to the Acting Secretary of State, September 17, 1923, Dept. of State Press Release, February 16, 1927.

traversed in one hour by the vessel suspected of" smuggling. The need of Great Britain was to be met by our allowing "British vessels voyaging to or from the ports or passing through the waters of the United States to have on board alcoholic liquors listed as sea stores or as cargo destined for a foreign port, provided that such liquor is kept under seal while within the jurisdiction of the United States."[18]

The draft of treaty submitted by the British Government was accepted with a few purely verbal changes. Thereby, as stated in *Ford* v. *United States*, 273 U. S. 593, 609-610, this country secured "a definite fixing of the zone of legitimate seizure of hovering British vessels seeking to defeat the laws against the importation of liquor into this country from the sea."

Second. The Treaty, being later in date than the Act of 1922, superseded, so far as inconsistent with the terms of the Act, the authority which had been conferred by § 581 upon officers of the Coast Guard to board, search and seize beyond our territorial waters. *Whitney* v. *Robertson*, 124 U. S. 190, 194. For in a strict sense the Treaty was self-executing, in that no legislation was necessary to authorize executive action pursuant to its provisions.[19]

The purpose of the provisions for seizure in § 581, and their practical operation, as an aid in the enforcement of the laws prohibiting alcoholic liquors, leave no doubt that the territorial limitations there established were modified by the Treaty. This conclusion is supported by the course of administrative practice. Shortly after the Treaty took effect, the Treasury Department issued amended instructions for the Coast Guard which pointed out, after reciting the provisions of section 581, that "in cases of special treaties, the provisions of those treaties shall be complied with"; and called attention particularly to the recent treaties

[18]Draft Treaty, left with the Secretary of State by the British Chargé d'Affaires, December 3, 1923.

[19]Ford v. United States, 273 U. S. 593. Such was the view of the Secretary of State, expressed in a letter of March 3, 1924, to the Chairman of the House Committee on Foreign Affairs. See Hearings Before the Committee on Foreign Affairs, House of Representatives, on H. Res. 174, 68th Cong., 1st Sess., p. 7. Compare, as to the meaning of "self-executing", Edwin D. Dickinson, Are the Liquor Treaties Self-Executing? 20 American Journal of International Law, p. 444.

dealing with the smuggling of intoxicating liquors.[20] The Commandant of the Coast Guard, moreover, was informed in 1927, as the Solicitor General states, that all seizures of British vessels captured in the rum-smuggling trade should be within the terms of the Treaty and that seizing officers should be instructed to produce evidence, not that the vessel was found within the four-league limit, but that she was apprehended within one hour's sailing distance from the coast.

Third. The Treaty was not abrogated by re-enacting § 581 in the Tariff Act of 1930 in the identical terms of the Act of 1922. A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed. *Chew Heong* v. *United States,* 112 U. S. 536; *United States* v. *Payne,* 264 U. S. 446, 448. Here, the contrary appears. The committee reports and the debates upon the Act of 1930, like the re-enacted section itself, make no reference to the Treaty of 1924. Any doubt as to the construction of the section should be deemed resolved by the consistent departmental practice existing before its re-enactment. Compare *United States* v. *G. Falk & Brother,* 204 U. S. 143; *Nagle* v. *Loi Hoa,* 275 U. S. 475, 481; *Brewster* v. *Gage,* 280 U. S. 327, 337; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *United States* v. *Ryan,* 284 U. S. 167, 175. No change, in this respect, was made either by the Department of the Treasury or the Department of Justice after the Tariff Act of 1930.

Searches and seizures in the enforcement of the laws prohibiting alcoholic liquors are governed, since the 1930 Act, as they were before, by the provisions of the Treaty. Section 581, with its scope narrowed by the Treaty, remained in force after its re-enactment in the Act of 1930. The section continued to apply to the boarding, search and seizure of all vessels of all countries with which we had no relevant treaties. It continued also, in the enforcement of our customs laws not related to the prohibition of alcoholic liquors, to govern the boarding of vessels of those countries with which we had entered into treaties like that with Great Britain.

Fourth. As the Mazel Tov was seized without warrant of law, the libels were properly dismissed. The Government contends that

[20] Amendments to Instructions, Customs, Navigation, and Motor-Boat Laws and Duties of Boarding Officers, 1923, No. 3, issued December 11, 1924.

the alleged illegality of the seizure is immaterial. It argues that the facts proved show a violation of our law for which the penalty of forfeiture is prescribed; that the United States may, by filing a libel for forfeiture, ratify what otherwise would have been an illegal seizure; that the seized vessel having been brought into the Port of Providence, the federal court for Rhode Island acquired jurisdiction; and that, moreover, the claimant by answering to the merits waived any right to object to enforcement of the penalties. The argument rests upon misconceptions.

It is true that where the United States, having possession of property, files a libel to enforce a forfeiture resulting from a violation of its laws, the fact that the possession was acquired by a wrongful act is immaterial. *Dodge* v. *United States,* 272 U. S. 530, 532. Compare *Ker* v. *Illinois,* 119 U. S. 436, 444. The doctrine rests primarily upon the common-law rules that any person may, at his peril, seize property which has become forfeited to, or forfeitable by, the Government; and that proceedings by the Government to enforce a forfeiture ratify a seizure made by one without authority, since ratification is equivalent to antecedent delegation of authority to seize. *Gelston* v. *Hoyt,* 3 Wheat. 246, 310; *Taylor* v. *United States,* 3 How. 197, 205-206. The doctrine is not applicable here. The objection to the seizure is not that it was wrongful merely because made by one upon whom the Government had not conferred authority to seize at the place where the seizure was made. The objection is that the Government itself lacked power to seize, since by the Treaty it had imposed a territorial limitation upon its own authority. The Treaty fixes the conditions under which a "vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with" the applicable laws. Thereby, Great Britain agreed that adjudication may follow a rightful seizure. Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws. To hold that adjudication may follow a wrongful seizure would go far to nullify the purpose and effect of the Treaty. Compare *United States* v. *Rauscher,* 119 U. S. 407.

The case differs from *The Ship Richmond,* 9 Cranch 102, and *The Merino,* 9 Wheat. 391, where forfeitures of vessels wrongfully

seized by our Navy were upheld.[21] There, the vessels seized were of American registry; and the seizures did not violate any treaty, but were merely violations of the law of nations because made within the territory of another sovereign. In those cases it was held that the illegality of the seizures did not affect the venue of the action or the process of the court. Here, the objection is more fundamental. It is to the jurisdiction of the United States. The objection is not met by distinguishing between the custody of the Coast Guard and the subsequent custody of the marshal. Nor is it lost by the entry of an answer to the merits. The ordinary incidents of possession of the vessel and the cargo yield to the international agreement.

The decree of the Circuit Court of Appeals is

Reversed.

Mr. Justice SUTHERLAND and Mr. Justice BUTLER are of opinion that in respect of British vessels engaged in smuggling intoxicating liquor into the United States the treaty of 1924 was not intended to cut down the rights claimed by the United States under the hovering statutes in force since the organization of our government, but that it was the purpose of both countries to extend and enlarge such rights to enable the United States more effectively to enforce its liquor laws and that therefore the decree of the Circuit Court of Appeals should be affirmed.

Mr. Justice VAN DEVANTER took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[21]See, also, The Homestead, 7 F. (2d) 413, 415. Compare United States *v.* Bowman, 260 U. S. 94.